

JUDGMENTS
OF THE
PRIVY COUNCIL
ON
APPEALS FROM INDIA:

FROM 1831 TO 1867.

BY

D. SUTHERLAND,

TERMS.

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JUDGMENTS
OF THE
P R I V Y C O U N C I L
ON
APPEALS FROM INDIA.

The 21st May 1831.

Onus probandi—Partition—Hindoo Law.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Luximon Row Sadasew,

versus

Mullar Row Bajee.

The *onus* of proof is on the party seeking to except any property from the general rule of partition according to Hindoo Law.

The Lord Chancellor.—Their Lordships having taken this case into their full consideration, in the course of the argument yesterday as well as to-day, do not see any ground upon which they can reverse or interfere with the decision come to below. They desire it, however, to be distinctly understood, on account of the importance of the question, if it had ever been raised, which it does not appear to have been, with respect to the general principle of adoption and the consequences following from that principle, that they give no opinion whatever, in the slightest degree interfering with the acknowledged principles of the Hindoo law as regards that relationship.

There is a passage in a letter from the Chief Secretary, Mr. Chaplin, dated Poona, April the 11th, 1821, which looks as if he, in an untechnical and somewhat popular view of the merits of the decision which he is then discussing, had taken into his consideration the circumstance of the party having stood in the relation merely of an adopted son, and not being a lineal descendant of the deceased Bhow Munkeswur. He says, "it must also be considered that he is merely an adopted son, and not the lineal descendant of the deceased Bhow, and that his own immediate ancestor contributed in no respect to the acquisition of the property."

The relationship of adoption, the rights belonging to that relationship when established, and the law that gives the right to the adopted son, independent of his being a stranger in blood, and independent of the fact of his own ancestor having had no share in the acquisition of the property, are by no means touched by the decision that Mr. Mountstuart Elphinstone came to that is now appealed from, and which alone is affirmed by their Lordships' present decision.

The grounds upon which Mr. Elphinstone appears to have come to his decision are, that the proof lies upon the party seeking to except any property from that principle of partition known to the Hindoo law, and that the appellant not having sufficiently proved that it is unnecessary to go further ; that he not having brought forward proof that this property is within those exceptions, the general rule of partition must prevail.

It appears from a case thrown out in the course of the argument, that the exceptions themselves form a case thrown out in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof is upon the party who would seek to bring himself within it. They are very minute in their conditions ; and in one instance that inference appears to be furnished by the rules of the Court restoring property to the operation of the principle after it shall have been brought within the exceptions. For instance, learning is one of the undeniable exceptions ; and if that shall be proved, it brings the property within the exception. But it is added, if it shall be shewn there was equal learning possessed by the other parts of the family, that gives them a claim to it notwithstanding the circumstance of its being brought within the exception. So that here one proof brings it within the rule, and another throws it back, notwithstanding the exception. This is one illustration, among many others, which might be given. I mentioned another in the course of the argument, as to the clothes of a party incapacitated by nature or by accident from procreating children, which appear by the Hindoo law to be excepted. All these details shew that the proof must be upon the party seeking to bring it within the excepted case.

Now, it appears here very doubtful in what way, and indeed there is no evidence in what way this man, though we may suspect it from what is stated—there is no proof in the cause that shews how this property was acquired ; but it is perfectly clear, as it appears to their Lordships, that there was some family property in which the Bhow share, although not large, and that that property was never abandoned, but taken to by the Bhow, who was enjoying the more splendid fortune of the Durbar at Poonah ; and he left his brother, it appears by the correspondence between him and Bajee Row Mankeswur, in the 82nd and 83rd folios of the Appendix, in some sort of charge of the property, and always appeared to take an interest in it, and to report respecting the management of it, though his agent complains of not having received any orders from the Bhow. His brother says, when he was getting ready to proceed to the appointment which had been provided for him, “ You have quite suddenly provided this for me, as for six years you have merely employed me in the charge of the fields, &c., at home ;” and there are other letters from Row Mankeswur, which shew that the Bhow was still connected with the property. It cannot, therefore, be said, there is no property, though it is very small ; nor can it be said he gave it up. He maintains a more immediate connection with it than would be supposed natural to a man placed in a much higher situation and separated from it by local circumstances.

Upon the whole, viewing this as a question of Hindoo law, upon which it is impossible to speak with any great confidence, and the question appearing to their Lordships to be decided upon right grounds, throwing the proof upon the right party, and that proof not being given, it is the opinion of their Lordships that this decree appealed from must be affirmed.

With respect to the costs, we take for granted that the respondent, in a large property of this kind, will make no application for costs ; and it would not be an unfit thing (I do not know what the Court below have done) to suggest, that it would be proper that the costs of the whole proceeding should be paid out of the estate. It is a very large property.

Mr. Adam.—We make no objection, if that is the impression of your Lordship's mind.

The Lord Chancellor.—It is a very large property. The question is, whether it is £200,000 or a larger sum.

Mr. Miller.—There may be difficulties in it.

The Lord Chancellor.—We shall hear no more of it. We call your attention to it.

The 4th January 1834.

Limitation—Maintenance.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

George James Gordon, Executor of Futteh Yab Khan,

versus

Khajeh Aboo Mahomed Khan.

*The *nullum tempus* Clause of Section 3 Regulation II. 1805 does not apply to a case where the occupant was not a mortgagor or depositary otherwise than as he was subject to pay a portion of the proceeds of the property to another during her life-time.

The Vice Chancellor.—IN this case their Lordships are of opinion that it is not necessary to hear Counsel for the respondents. Their Lordships are all of opinion that, in any way of putting the case, the appellants are barred by length of time, having regard to those Regulations. If the appellants think that their claim has been made out by virtue of what is called the Mahomedan law of inheritance, independently of the decree of 1777, then it appears that Nadira Begum died in the year 1798, and there is no reason whatever why they might not, as the heirs of Nadira Begum, have brought their suit prior to the year 1777. But if it is put upon the circumstance, that by the decree of 1777 she is to be considered as having acquired a right to a fourth part, you must look to the terms of the decree of 1777.

Now the decree of 1777, as it is set forth in the printed papers, directs that, "as to the altumgha mehals, Behadur Khan shall, on the part of Aulem Beg, hold "and keep possession and occupation of them, and shall annually give to Mussumat "Nadira Begum, during her natural life, three shares of twelve, as aforesaid, from "the produce of them." And it is remarkable that, in looking at the report by Macnaghten of the suit between Omar Khan and Aboo Mahomed Khan and others, which was a cause between the heirs of Aulem Beg, there seems to be a translation of that very proceeding of 1777, which represents that the altumgha, according to custom, was to be delivered over to the charge of Behadur Khan, who was to hold and keep possession for her maintenance.

Their Lordships are therefore of opinion that, upon the true construction of this decree of 1777, Behadur Khan was to be considered merely as the depositary or agent for Aulem Beg, who was the heir of the deceased party, the husband of Nadira Begum, liable only to the obligation to pay to her, for her life only, the produce of one-fourth of the inheritance; and it is plain, upon looking to what took place in the case of the dispute between the heirs of Aulem Beg, that any right on the part of Aulem Beg or her heirs to inherit after the expiration of her life, never was in any way acknowledged.

Their Lordships are of opinion, therefore, that the Regulation of 1793 directly applies to this case; and it is impossible to say that this case can be brought within the third Section of the Government Regulation II of 1805, because it cannot be truly said the Behadur Khan was a mortgagor or depositary only for Nadira Begum, otherwise than as he was subject to pay to her one-fourth of the proceeds during her life: and their Lordships being of that opinion, the consequence is, that the decree of the Court below must be affirmed. But inasmuch as it does appear that there was some variance as to the opinions and the reasons upon which the judgment proceeded, I think it should be affirmed without costs.

Mr. Serjeant Spankie.—Your Lordships are aware, that in this case the East India Company come forward upon the application of the respondent.

The Vice-Chancellor.—Yes, we are aware of that.

Mr. Serjeant Spankie.—The reason of my mentioning it is, that I am not sure whether this case falls under the Act of Parliament. The East India Company came in upon the desire of the party, in obedience to the wish of the Privy Council; so that there seems reason for saying that they ought to be paid their costs by the respondent.

The Vice-Chancellor.—Then I think you had better present a petition, stating the circumstances.

Mr. Serjeant Spankie.—We will do so.

The 6th January 1834.

**Long possession prima facie evidence of title—Adoption in Bareilly—
Title of third person.**

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rajah Haimun Chull Sing,

versus

Koomer Gunsheam Sing.

Uninterrupted and undisputed possession for a long period of time constitutes sufficient *prima facie* evidence of title; but if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails.

In the district of Bareilly the authority of the husband is essential to the validity of an adoption.

So much of the Sudder Court's decision as determined the question of title of a third person, which was not the question in the cause, was reversed.

Mr. Justice J. Parke.—THIS case comes before their Lordships on an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, in a suit originally brought by the appellant, in the month of December 1810, in the Provincial Court of Bareilly, against Rany Bhuddorun, for the recovery of the zemindary or talooka of Rohroh. The appellant claimed as the adopted son of the deceased Rajah Koosul Sing, proprietor of that talooka, who died about 1775. He claimed by virtue of an adoption which was made about 1778 or 1779, when the appellant was two years old, by one or both of the deceased Rajah's widows, Rany Chunder Bunse and Rany Bhuddorun. He also alleged that he had been in possession of the zemindary, and acknowledged as the Rajah or zemindar, from that time till the occupation by the British Government, in 1801 or 1802, of the Ceded Provinces, of which this formed a part. He stated that the first triennial settlement was formed with him in that character in 1803, and that on its expiration the original defendant, the Rany, fraudulently acquired possession and obtained the subsequent settlement.

The defendant disputed the fact of the alleged adoption, and denied its validity if true, and insisted that the appellant never had the possession of the zemindary in his own right.

Evidence was given on both sides in the Provincial Court as to the facts (but none in support of the fraud suggested by the claimant), and the opinion of the Pundit of the Zillah Court was obtained upon the law; and on the 12th of April 1813 a decree was pronounced against the claim of the appellant. From that an appeal took place to the Sudder Dewanny Adawlut in January 1815. Pending the proceedings in that Court, and in the course of the same year, the original defendant died, and a proclamation was made for her heirs to come in and defend the suit.

On the 8th July 1817, the present respondent who claimed to be the heir of the deceased Rajah as his son by a Gundarpy marriage to a seventh wife, and Buttun Sing who claimed as the son of the daughter of Rany Chunder Bunse, were admitted as acting for the deceased respondent. In the meantime the Collectors of

the district appear to have put the appellant into possession of a moiety of the malikana rights of the zemindary in question during the life of the Rany Bhuddorun, and after her death, in October 1815, into the exclusive possession of the whole ; and this possession appears to have continued until the determination of the suit.

The Pundits of the Sudder Court, and also the Pundit of the Provincial Court of Bareilly, were afterwards consulted. Some precedents were referred to, which form a part of the printed Appendix, and the Court pronounced its final decree on the 12th August 1817, by which, in the first place, the decision of the Provincial Court disallowing the claims of the appellant was confirmed, and in the second, it was finally and fully ordered, that the property in dispute should, in right of succession, descend to Gunsheam Sing, as the son of the Rajah Koosul Sing, as the proprietor ; that the claim of Ruttun Sing should be disallowed, and Gunsheam Sing is in effect directed to be put into possession of the disputed zemindary.

From this decree an appeal has been made to the King in Council, and the case has been argued with great talent on both sides.

The two parts of this decree require a distinct consideration. As to the first the only question is, whether, upon the evidence adduced by the appellant and the Rany, he has established a right to the zemindary as against her ; and in deciding that question, the alleged title of the now respondent (which, if true, would have prevented the adoption altogether) must be wholly omitted. It has never been proved as a fact in the cause for decision, as between the appellant and the Rany, nor indeed for any purpose, that the deceased Rajah had a child, the present respondent.

Upon the evidence, the whole question turns on the fact of the alleged adoption and its validity according to the Hindoo law.

Their Lordships by no means question the doctrine contended for by the learned Counsel for the appellant, that uninterrupted and undisputed possession for a long period of time constitutes sufficient *prima facie* evidence of title. That is a recognized rule of our law, and upon general principles, for the sake of the security of property, seems to be applicable to that of other countries, where the lawgiver has not specially established a different provision. Nor is it disputed that such a possession, even for a less period than that which elapsed between the years 1778 or 1779, when the alleged adoption took place, and 1805 or 1806, when the Rany obtained the settlement of the talooka, would have been sufficient to have thrown the burthen of disproving the title of the claimant on the opposite party.

Whether, in this case, such a possession has been proved on the part of Haimun Chull Sing is very doubtful ; but their Lordships think it wholly unnecessary to examine the evidence of it in detail, because, assuming that the possession was proved, it is perfectly clear, upon the plaintiff's own shewing, that such possession is referable to his alleged title by adoption, and to that alone. If there was no title by adoption, the possession avails nothing.

Of the fact of an adoption by the senior widow no reasonable doubt can be entertained ; and therefore the question is reduced, upon this branch of this case, to this single point : Whether that adoption was valid in point of law, or not ?

It may also be admitted, on the assumption of the proof of undisputed possession for a long space of time, that every presumption of fact should be made in favor of the validity of the act by virtue of which it took place, and that the *onus* of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proof, ought to lie on the other side.

Does it then appear that this adoption was, by the Hindoo law, in force in this district, invalid ? It must be first determined what the provisions of that law are.

On the part of the appellant it is insisted that a widow (and if there be more than one, the senior widow) may make a valid adoption of a relative of the deceased husband, provided it be done with the consent of the nearest relatives of that husband, who are the widow's natural guardians ; and that if an only or eldest

son be given, such gift may be made without guilt in the giver, if made in the particular form called *dwayamushyáyana*, and if not, is nevertheless valid when made.

On the part of the respondent it is insisted, that the authority of the husband is absolutely essential to the validity of the adoption, and that a gift of an only or eldest son, unless in the above-mentioned form, is not merely a violation of the law in the giver, but is absolutely void.

The Court of Bareilly pronounced against the appellant, on the ground that, though the widow might make an adoption, she could not do so without the consent of her own relations, which was not given. The Sudder Dewanny Adawlut confirmed that decision on a different ground; namely, that by law, the authority of the husband was essential, and that such authority was wanting in this case.

Their Lordships are now to decide, whether that position is correct; and they must decide with the means of information with which their Lordships have been supplied, partly from the Native authorities in the several Courts below, and partly from the text-books which have been cited in the course of the argument. They are bound to act according to the usual practice, and not to advise the reversal of the decree of the Court, unless they are satisfied that the decree is wrong; and more especially, in a case in which the Judge of that Court, from his education and habits, must necessarily have more information on the subject than most of their Lordships now present can be supposed to possess.

Upon a full consideration of these authorities, their Lordships are of opinion that they cannot come to the conclusion that the decision of the Court below is wrong. According to the Native text-writers it seems to be clear, that the ancient law of Hindostan required the authority of the husband; but it is also clear that the strictness of that law has been in many districts relaxed or modified by local usage; and the opinion of the Sastries, as published in Mr. Borradaile's Bombay Reports, is very strong to shew that in the Mahratta States to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not, in their Lordships' judgment, established; on the contrary, the weight of the authority is in favor of the opposite conclusion. The opinion of the Pundits of the Sudder Court, both in this case and the case of Shumshere Mull (Appendix p. 83), and that of the Pundit of the Provincial Court of Appeal of Benares in the latter, appearing to be entitled to more credit than those of the Pundits of the Zillah and Provincial Courts of Etawah and Bareilly and of the City Court of Benares.

Without pretending to decide what is the law in other districts of India, their Lordships feel bound to say, that in this particular district, upon the authorities brought forward in this particular case, they must pronounce that the law requires the direction of the husband in order to the validity of an adoption; at all events, they cannot say that it does not; which they must do in order to reverse the judgment in this case.

Then, was there such an authority given in this case? It is clear from all the evidence that it was not. There is no evidence of any kind leading to the supposition that it was. The interval of four years which elapsed between the Raja's death and the adoption, raises a strong presumption that his authority was not given; for if it had been, a direction so important in a religious point of view, would naturally have been carried into effect much sooner after his death; and besides, no one pleading or document on the part of appellant, at any stage of the case, suggests that such an authority was given.

Their Lordships therefore think, upon this view of the law, that upon the evidence in this case it clearly appears that the adoption was invalid, and the title which rests on that adoption, and was the foundation of the suit, being for this reason invalid, the Appellant must fail in that suit, and so much of the judgment as affirms the decree of the Court below must be itself affirmed.

It is unnecessary to determine whether the other objections to the adoption were well founded : probably they were not.

The second part of the decree, which establishes the right of the respondent and in effect directs him to be put in possession of the zemindary, cannot, in the judgment of their Lordships, be supported.

• It was contended that the appellant had no interest in that part of the decision, and could not be heard to complain of it. But, in truth, he had an interest ; at least, it is not clear that he had not some interest. If he had acquired no right to the possession subsequent to that right upon which he founded his plaint, he could perhaps have had no ground to complain of a decision which, after negating his claim, affirmed that of another : but as he certainly acquired a possession of some sort by lawful authority, if the Collector's statement in evidence in the cause be correct, by a grant by the Executive Government after the Rany's death, that title should not have been disturbed by the decree of the Sudder Court establishing the right of another, who was not for this purpose a party to the cause, but the appellant should have been allowed to retain possession, as far as that Court was concerned, and the Executive Government, which gave the title, should have been left free to allow it to continue or to be taken away, as it thought fit.

That title was not given upon the footing of any preceeding decree which was reversed, but probably was bestowed because the appellant was supposed by the Government to be the adopted heir ; and the language of the Collector's report is in favor of that supposition. It may possibly have been given, because the zemindary was deemed a *bonam vacans*, and the appellant was thought a fit person to receive the grant. In the former case, it was for the Government to rectify the mistake, by withdrawing the grant after the affirmation of the decree of the Provincial Court and granting to whom it pleased. In the latter, the appellant ought to have been permitted to continue in possession, subject to be dispossessed by any one shewing a title not barred by lapse of time. But the Court of Sudder Dewanny Adawlut has no right at all to determine the question of title of a third person, for it was not the question in the cause, and that part of their decree which has this effect, their Lordships will recommend to His Majesty to reverse, and after that reversal the Executive Government will deal with the possession as it thinks fit.

Mr. Miller.—Do your Lordships intend that reversal to be with costs ?

Mr. Justice J. Parke.—No, without costs. It is partly affirmed and partly reversed, without costs.

Mr. Miller.—And we are to be put in possession, as we were at the time of the grant ?

Mr. Justice J. Parke.—We leave it to the Executive Government to deal as they think fit with the possession.

The Vice Chancellor.—On the part of the East India Company, do you make any application as to costs ? The Company have brought forward the case.

Mr. Serjeant Spankie.—Yes, my Lord.

The Vice Chancellor.—There is a sum raised by the Zemindar and deposited in the hands of the Company for the costs.

Mr. Serjeant Spankie.—That was in lieu of security.

Mr. Justice Bosanquet.—As to the costs disbursed on account of the appellant, the appellant is personally liable to repay the Company such costs as have been incurred by them in carrying on the cause.

Mr. Serjeant Spankie.—Will your Lordships make that a separate order or will it accompany the other ?

Mr. Justice Bosanquet.—It will accompany the other. You have seen the order of the King in Council.

Mr. Serjeant Spankie.—Yes, my Lord. That one made at Brighton I have seen. It directs that the costs are to be paid by such persons, and in such manner, and that the Company should have such liens as the Judicial Committee should

direct. The terms must be inserted in the order. This is the first case of the kind, and it is desirable it should be drawn up with care.

Mr. Miller.—If your Lordships see no objection to it, the order can be drawn up with liberty for the parties to except before it is finally passed.

Mr. Justice J. Parke.—There is no difficulty in drawing up the order if you understand the principle.

The Vice Chancellor.—If you will take the trouble of drawing up between yourselves some order regarding the costs, and then let their Lordships see it, they will make such alterations as they think expedient.

Mr. Justice J. Parke.—The principle upon which it will be to be settled is this: that the East India Company must take their remedy against the respondent for his costs, and take their remedy against the appellant for such costs as they have incurred upon his part upon the sum deposited?

Mr. Serjeant Spinkie.—We shall have a lien upon the sum deposited.

Mr. Justice J. Parke.—Yes; and if any sum remains, that is to be returned.

Mr. Lloyd.—The way your Lordships dealt with it in the cases compromised was this: that the costs of the Company were paid out of the fund deposited, and then a remedy over on behalf of the respondent against the appellant. Whether you think that should be carried into effect in this case, your Lordships will say.

Mr. Justice J. Parke.—No; it would be hard to make the appellant pay the costs of the respondent in this case.

The 8th January 1834.

Loan for Zemindary—Suit against Zemindar for Debt—Regulations of 1781 and 1787.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Gopee Mohun Thakoor and others,

versus

Raja Radhanat.

Where money was borrowed to pay the revenue due from a Zemindary and paid to the Government on that account, the bond given by the Vakeels and Managers of the Zemindary to the trustee for the lenders in the English form for the purpose of enabling them to enforce the personal engagements of the Vakeels and Managers in the Supreme Court, was held not to deprive the lenders of their right, under the law prevailing among the natives, in matters of contract to sue the Zemindar in the Courts of the Mofussil.

Held also that the laws of 1781 and 1787 were repealed by the laws of 1796, when this action was brought, and there was nothing in those two former Regulations which made it illegal for the Zemindar to contract a debt, or for any other native to take an obligation from a Zemindar, without the consent of the Officers of Revenue; but that such an obligation, if founded on a valuable consideration, would be equally binding upon the conscience of the Zemindar, and the demand and the payment would be equally legal as if such consent had been obtained and registered, though no Court of Justice might have jurisdiction to enforce the right.

Mr. Justice Bosanquet.—In this case a suit was commenced in the year 1796 in the Zillah Court of Dinapore by the appellants, representing Durp Narain Takoor and Banarassey Ghose, who were money-lenders at Calcutta, against the zemindar, Rajah Radhanat, to recover a large sum of money, amounting to 80,150 rupees, alleged to have been advanced by them in 1780 for the use of the zemindary, during the minority of the zemindar, to two persons named Janikiram Sing and Sudanund Sirkar, who were the lawfully appointed Managers and Vakeels of the zemindary.

The principal part of this sum was said to have been advanced for the purpose of enabling those persons to pay the kist then due from the zemindar to Government, and to have been actually received by Government, in discharge of the kist.

To secure the money thus advanced, in 1786 a bond in the English form was given by Sudanund Sircar, the Vakeel, at Calcutta, to an English gentleman, as a trustee for the lenders; and the amount not being paid, another bond was given for the same amount, with interest, in 1787, by Janikiram Sing and Sudanund Sircar, to the same trustee, who in each case signed a declaration of trust in favor of the lenders. The first bond was not put in suit, having been given up; but the money not being paid, the two obligors in the last bond were sued upon it in the Supreme Court and taken in execution, and Janikiram Sing died in jail.

The Zillah Court dismissed the suit against the zemindar. On an appeal from the decree of the Zillah Court to the Provincial Court, much evidence was given which had not been laid before the Zillah Court. The former decree was reversed with costs, and the Provincial Court determined that the zemindar was liable to pay the sum of 60,300 rupees, the amount for which the bond was given, together with interest equal to the whole principal, making together 1,20,600 rupees, the amount of the penalty of the bond, that Court being of opinion that whatever loan borrowed in the time of Janikiram Sing or of any other Surburakar of the zemindary should be proved to have been actually paid into the Treasury, was payable by the zemindar from the zemindary; and being also clearly of opinion, that 60,300 rupees paid by the money-lenders was received into the treasury on account of the zemindary. The sum of 300 rupees, in addition to the 60,000 rupees, the amount of the loan, appear to have been the expenses attending the transaction, being just one-half per cent. upon the loan; and the Provincial Court seems to have treated the account of the obligee upon the zemindar as commensurate with the penalty of the bond.

On appeal to the Sudder Dewanny Adawlut, the decree of the Provincial Court was reversed and that of the Zillah Court affirmed.

The only reason for this reversal, which is distinctly expressed by the Judges of the Sudder Dewanny Adawlut, is founded upon the latter part of Article 20 of the Regulations of July 1781 and 1787, which, they say, was overlooked by the Provincial Court when referring to that Article, which, after prohibiting the Courts of Justice from determining any suit against any zemindar, talookdar, chowdry, or other holder of land being malguzary, unless it should be proved to the satisfaction of the Court that the money originally lent, arising from such other valuable consideration, was for the service of the zemindary, talookdary, chowdry, or other land, and actually paid to the Government as part of the revenues thereof, proceeds expressly to prohibit the Courts of Justice from passing any decree in any suit against a zemindar or other landholder of malguzary lands, concerning any debt, contract, bond, or other engagement, concluded by them after the 1st of August 1781, unless proved to have been contracted with the previous sanction and consent of the Committee of Revenue, and that a note or memorandum, specifying such consent, has been registered in the Sudder Kanoongoe's office.

The Judges of the Sudder Dewanny Adawlut do not express any opinion upon the effect of the evidence, or any dissatisfaction with the conclusion drawn from it by the Provincial Court, but formed their decree of reversal upon the Clause of the Regulations which had not been noticed by the Provincial Court; and they state no particular objection to the principle of the decision of the Provincial Court, but they simply add a remark (possibly, and I think most probably, in allusion to the effect of the Clause supposed to offer an insuperable impediment to the suit) that the suit was not instituted until Janikiram Sing had died in jail, where he was confined on account of a decree obtained against him in the Supreme Court for the amount of the bond, the subject of the present action; and that the natural inference to be drawn from this fact is, that the respondents in that Court did not at that time conceive that they could maintain any suit at law on account thereof against the appellant. The case has been argued, both upon the effect of the evidence and upon the law. The evidence is alleged by the respondent to be

insufficient to support the conclusion of the Provincial Court, and the appellants insist that the Clause of the Regulations relied upon by the Sudder Dewanny Adawlut was rescinded at the time when the suit was commenced, and consequently that the appellants were, at liberty to pursue their remedy as if the Clause never had existed.

Their Lordships are of opinion that the evidence laid before the Provincial Court sufficiently established that the sum of 60,000 rupees was advanced by the persons whom the appellants represent, by means of a hoondy, or bill of exchange, drawn on the house of Guinness Doss of Calcutta in favor of the Collector at Moorshedabad, and received into the treasury of the Government on account of the kist due from the zemindary of Raja Radhanat, and paid when due; and they are also of opinion that, upon the evidence, this sum must be taken to have been advanced, not to Janikiram and Sudanund Sircar, or either of them, in their individual characters or upon their own account, but advanced to them as manager and vakeel of the zemindary, and consequently according to the law prevailing among the natives of India, became the subject of demand upon the zemindar for whose benefit it was advanced. The hoondy was given by the Shroffs or money-lenders at Calcutta to Sudanund Sircar, who was the Vakeel of the zemindary. Both the money-lenders went with him to the Khalsa or treasury to see the hoondy delivered to the proper officer of the revenue, and the Vakeel alone, in the first instance, gave any bond by way of security to the lenders. The payee in the bond was an English gentleman, a mere trustee to the money-lenders, whose name was introduced for the purpose of enabling the parties interested to sue in the Supreme Court, and the omission of the Rajah's name, and of any mention of the zemindary in the bond, as well as the omission to obtain and register the consent of the Committee, or Board of Revenue, may well be accounted for, from the apprehension that the introduction of any matter, apparently relating to the revenue, might prejudice the right to sue in that Court, and consequently retard the remedy there of a judgment on the bond.

It has not been suggested that the money was advanced on the personal account of Sudanund Sircar, the Vakeel, nor is it likely that it should be so advanced; and if it was to be so advanced for the personal benefit of Janikiram, it is very improbable that the bond should have been taken from the Vakeel of the zemindary only. The bond not having been discharged, another bond was required in the following year, from both Janikiram and Sudanund Sircar. But the question to be determined relates to the money advanced in 1786; for if the money then supplied was advanced on account of the zemindary, the joint and several bond given as a security in the ensuing year, will not vary the nature of the loan or discharge the liability of the Zemindar.

No evidence was adduced on the part of the respondent to rebut the inference, that the money so advanced to the Vakeel, with which the kist of the zemindary was actually discharged, was advanced for the benefit and on account of the zemindary; and though it has been remarked that the delay of the money-lenders to commence any suit against the zemindar after the death of Janikiram, affords reason to suppose that they thought that they had no right to do so, we do not know when the Rajah came of age, or what was the condition of the zemindary, from that time to the commencement of the suit by the Appellants in 1796, about four years after the death of Janikiram, or what was the state of the families of the lenders, who died between the time of the loan and the commencement of the suit, or how soon the parties were apprised that they might sue the zemindar with a prospect of success, in consequence of the impediment to their suit, which existed at the time of the transaction, being removed. The real question is, whether the money was expressly advanced for the use of the zemindary, or generally for the use of those who received it, to be applied as they might think fit; and their Lordships are of opinion, that the circumstances which accompanied the loan, in the first instance

when the only security required was that of the Vakeel of the zemindary, a person of very inferior station compared with that of Janikiram, the uncle of the zemindar, and the precaution taken by the money-lenders of accompanying Sudanund Sircar to the Khalsa to see the hoondy delivered to the proper officer of Revenue, are sufficient to decide this question, and to shew the transaction to have been of the former character.

If, then, the circumstances of the case establish that the money was borrowed on account of the zemindary, and was paid to the Government on that account, the bond given by Sudanund Sircar to a purchaser for the lenders in the English form, for the purpose of enabling them to enforce the personal engagement of the Vakeel in the Supreme Court, will not deprive the lenders of their right, under the law prevailing among the Natives in matters of contract, to sue the zemindar in the Courts of the Mofussil.

The remaining point to be considered is, whether the Government Regulation of 1781, which was in force at the date of the loan, and that of 1787, by which it was continued until 1790, had the effect of depriving the Appellants of their right to sue the Respondent in 1796.

If, according to the true intent and meaning of the Regulation of 1781, it operated as a prohibition of any such loan as that upon which the suit is founded, without the consent of the Committee or Board of Revenue registered as therein mentioned, the loan itself was illegal, and the subsequent repeal of the Regulation would not give a right to sue upon it; but if it amounted to nothing more than a restriction upon the jurisdiction of the Court over transactions of this description, unless sanctioned and registered as above-mentioned, the repeal of the restriction will open to the parties the right to seek any remedy in the Court, which, according to the general principles of the law, would be applicable to their case.

There is nothing in the Regulations of 1781 or 1787 which, either in the terms or the spirit of them, appear to their Lordships to make it illegal for a zemindar to contract a debt, or for any other native to take an obligation from a zemindar, without the consent of the officers of Revenue; such an obligation if founded on a valuable consideration, would be equally binding upon the conscience of the zemindar, and the demand and the payment would be equally legal, as if such consent had been obtained and registered, though no Court of Justice might have jurisdiction to enforce the right. Whatever may have been the notions of public policy, upon which the Native Courts were for some time restrained from taking cognizance of such transactions, those notions have not been deemed upon experience to be well founded, since that part of the 20th Article of the Regulation of 1781 and 1787 upon which the Court of Sudder Dewanny Adawlut rely, have been expressly rescinded by the Regulation of the 29th October 1796.

The title of a Regulation passed in 1793 (No. XXXVIII) has been referred to, which commences in the terms: "A Regulation for re-enacting, with modifications, such part of the rule passed on the 27th June 1787, as prohibits covenanted Civil Servants of the Company employed in the administration of justice or the collection of the public revenue, lending money to zemindars, independent talookdars, or other actual proprietors of land." The language of this title appears to treat the restrictions contained in the Regulation of the 27th June 1783 as amounting to prohibitions; and, in a popular sense, the law which deprives a creditor of his remedy, may be considered as prohibiting him from taking an obligation to pay him; but unless such be the true construction of the Regulation itself, that sense cannot be imposed upon it by the language of a subsequent Regulation, not expressly declaratory; much less by the title of a Regulation only. The Regulation of 1793, in modifying that of 1787, prohibits in express terms whatever is intended to be forbidden: then, if 1781 and 1787 are only restrictive of jurisdiction, and if they were construed as amounting to prohibitions, the extent of transactions which they embrace would lead to consequences highly inconvenient and unjust.

Their Lordships therefore are of opinion, that a report should be made to His Majesty by the Judicial Committee, recommending that the decree of the Sudder Dewanny Adawlut Court be reversed, and that the Court of Sudder Dewanny Adawlut be directed to affirm the decision of the Provincial Court; but without costs, as a difference of opinion has prevailed among the Courts below; and that, for the same reason, each party should bear his own costs of this appeal. The order must provide for the reimbursement of the costs incurred by the East India Company in prosecuting and defending the appeal.

The 8th February 1834.

Balance of Partnership accounts—Evidence—Section 16 Regulation VI. 1793.

On Appeal from the Sudder Dewanny Adawlut of Benjul.

Mussamut Sectul Bahoo,

versus

Bahoo Hurkishen Doss.

A suit having been brought in Benares for a sum alleged to be due on the balance of partnership accounts, the parties agreed by bond to refer the accounts to arbitrators, according to whose award a given sum was found due on balance of accounts to the plaintiff subject to certain objections which could not be settled without the inspection of the joint-concern papers of the Calcutta kothee. The Provincial Court ought to have postponed making its decree until either the copies had been verified or the originals had been produced, unless it could have been satisfied that there was no validity in the objections. But the Court was not satisfied that there was no validity in the objections, for, by its decree, it reserved a right to the defendant to recover what she could upon the objections. Whether the Provincial Court could have admitted the use of the original books upon a review of the decree, it was held that the Sudder Court ought, under Section 16 Regulation VI 1793, to have used the evidence to be supplied by the original books, or to have ascertained that the sum mentioned as the balance due, subject to the objections, was a balance due without objection, instead of merely affirming the decree of the Provincial Court.

The Vice Chancellor.—It appears in this case that a partnership had been carried on between Hurkishen Doss, Dwarika Doss, and another person, as bankers at Calcutta, which had transactions in various parts of India. The partnership was dissolved about 1797. Dwarika Doss died before 1806, and on the 2nd of October 1806 an action was commenced in the City Court, which was afterwards removed to the Provincial Court of Benares, by Hurkishen Doss against the widow of Dwarika Doss, who seems to have been then resident at Benares, and to have represented her deceased husband, for a sum alleged to be due on the balance of the partnership accounts. On the 24th of May 1808, the parties agreed by bond to refer the accounts to arbitrators. After some intermediate proceedings, the arbitrators made their final report about March 1814, which in effect stated a given sum to be due on balance of accounts to the plaintiffs, subject to certain objections, which, it was stated, could not be settled without an inspection of the joint-concern papers of the Calcutta kothee. There was some dispute on the question whether the original books should be brought from Calcutta; and shortly before the Provincial Court pronounced its decree, copies of the books were sent from Calcutta to Benares, but they were not proved to be correct copies. The Court, without allowing time to verify the copies or directing that the originals should be brought, proceeded to make its Decree Supplemental (Appendix, p. 40): "Ordered, &c. The defendant has the option of suing the plaintiff on the four objections she has advanced in this cause." The defendant, after the decree had been pronounced, procured the original books to be brought to Benares, and on the 5th December 1817 presented a petition for a review, stating the fact that the original papers had arrived, but the Court declared there was no ground on which to allow a review of the case. On the 5th May 1831 the defendant presented a petition of appeal to the Court of Sudder Dewanny Adawlut, calling the attention of the Court to the fact that the arbitrators' report noticed the objections, and that the original papers had been sent

to Benares before the petition of review was presented, and pointing out that, by the decree, liberty was given to the defendant to sue the plaintiff in respect of the four items which constituted the objection; but the Court of Sudder Dewanny Adawlut, on the 4th of July 1821, affirmed the decree, and on the 17th of November 1821 rejected the defendant's petition of review.

Upon the face of the report of the arbitrators, it appears that the accounts had not been fully taken, and could only be taken by inspecting the original books which were at Calcutta, or verified copies of them. The Provincial Court ought to have postponed making its decree, until either the copies had been verified or the originals had been produced, unless by some means it could have been satisfied that there was no validity whatever in the objections. But the Court was not satisfied there was no validity in the objections, for, by its decree, it reserves a right to the defendant to recover what she could upon the objections. It did, therefore, in effect, decide that a sum should be paid as the balance of accounts, although it admitted that the sum to be paid might not be the balance, and that, in substance, no part of it might be due at all. Whether the Provincial Court could have admitted the use of the original books upon a review of the decree, it is not necessary to determine; but it is clear, from the Regulation VI of 1793, Section 16, that the Court of Sudder Dewanny Adawlut might have used the evidence to be supplied by the original books. But it did not do so; nor did it ascertain that the sum mentioned as the balance due, subject to the objections, was a balance due without objection, but affirmed the decree as it originally stood.

Their Lordships are therefore of opinion that the decree must be reversed, and that the Court of Sudder Dewanny Adawlut must proceed to ascertain what, if anything, was really due from the defendant to the plaintiff, having regard to the objections noticed by the arbitrators.

The 11th February 1834.

Suit by Mahajun or Native Banker—Practice of Privy Council (as to judgments from Courts in India)—Costs.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Baboo Ulruk Sing,

versus

Beny Persad.

Suit by Mahajun or Native Banker. The Sudder Court, after having examined all the accounts and evidence, having come ultimately to the same conclusion that the Provincial Court had done, and the Privy Council being unable to see any clear distinct point upon which it could be said that the decision of the Courts below was wrong, affirmed the decision of the Sudder Court. As, however, there was delay in suing, and as the case was attended with a considerable degree of suspicion, the Privy Council refused to the respondent before it all costs, and decreed further that the cost of the appeal to the Sudder Court should also be disallowed.

Mr. Justice Bosanquet.—IN this case their Lordships are of opinion that the decree of the Sudder Dewanny Adawlut should be affirmed.

The case has been put upon two grounds: *first*, upon the merits of the case; and *secondly*, upon law. The point of law which was taken upon the original appeal, that the demand of the plaintiff did not fall within the time limited, has been given up as a matter of law; but the delay which occurred before the commencement of the suit has been insisted upon as an ingredient in the merits of the case; and it is impossible to look at this case without seeing that it is attended with a considerable degree of suspicion. At the same time, though it is attended with a considerable degree of suspicion, as well owing to the length of time as the death of a number of parties in the case, and the difficulty of making out this transaction which took place between Soobunslal, the agent of Roop Sing

the zemindar, and the banker employed on his behalf, still, upon the whole, the Provincial Court, as well as the Court of Sudder Dewanny Adawlut, having had the evidence before them that appears upon these papers, have come to the conclusion, in point of fact, that the demand of the plaintiff has been satisfactorily established.

Now, the question does not rest only upon the written accounts, but there is parol testimony, by which the demand of the plaintiff is in some material points supported.

The Court of Sudder Dewanny Adawlut, in giving their judgment, state this : "It appears to the Court that, although no books of any Mahajun can be considered good and sufficient to prove the claim of a Mahajun bringing an action, without the genuineness of them be established by the testimony of him who kept the books, or by that of the Accountant to the kothee, or without there are strong presumptions in their favor, yet as, upon a perusal of the extract from the books of the kothee of Gokool Doss and Golaub Doss for the Sumvit year 1856, whose proprietor was Mooteechund, it is in proof that dakhila transactions on account of the pergunnahs Zuhoorabad, Shadeeahad, &c., did exist in the said kothee of Soobunslal and Muthra Doss. It is clear that the sum of 2,51,071 rupees 4 annas, on account of the dakhila of the pergunnahs in question, was paid from the kothee of Seeta Ram, the father of the respondent, and that of that amount the sum of 1,95,275 rupees 2 annas and 9 pies was recovered; also that the sum of 55,796 rupees 1 anna and 3 pies (which agrees with the principal claimed by the respondent) is due. Hence no suspicion or doubt can attach to the books exhibited by the respondent." The Court of Sudder Dewanny Adawlut therefore proceeded not simply upon the books of the plaintiff himself, but upon a comparison of those books with the books of Soobunslal, the agent of the defendant, Roop Sing, and also with the books of Mooteechund; and it appears also in another part of the case that the books of the treasurer of the Rajah of Benares were also examined, to see how far they corresponded, and therefore an opportunity was afforded of looking into all those books, to see if they made out that these were fair transactions.

Now, taking the account as it appears in the books of the plaintiff, there appear to be "Debtor" and "Creditor" on the one side and the other; and the result of that debtor and creditor account, supposing it to be fair, brings out the balance claimed in this suit. And nobody can doubt, if they look at the two sides and compare the two, that they show the balance the plaintiff has recovered in this case, and upon which, according to the Regulation in Bengal, interest has been given equal in amount to the principal.

But in corroboration of this account, independent of its agreement with the other accounts, there are certain circumstances deposed to in the parol evidence that all very materially tend to corroborate the case, notwithstanding the suspicion that is excited, notwithstanding the delay in bringing forward the transaction, and its not having been brought forward till after the death of certain parties.

In the first place, it appears that Soobunslal was the agent for money transactions of the zemindar: he was what you may call his general steward. It appears, before these transactions took place with Seeta Ram's house, a banker was always employed to pay the money due to the Rajah of Benares. The banker immediately preceding Seeta Ram was Mooteechund, and there are two other bankers mentioned as preceding him. The transactions were carried on by paying these assessments into the treasury of Benares, through the medium of a banker, notwithstanding the Rajah had his steward or agent whose duty it was to conduct his money affairs. It then appears, at the time when Mooteechund ceased to be the banker of the zemindar Roop Sing, by the parol evidence, though not very precisely, that there was a sum of between forty and fifty thousand rupees, corresponding, therefore, in that respect, with the sum paid to Mooteechund, and the debt that was due from Roop Sing to Mooteechund. Further than that, it appears that there was that conversation deposed to in the Courts below, who had much better opportunities

than we have of deciding upon the credit due to these witnesses, though there are circumstances in the parol evidence much open to comment ; but it appears, upon the evidence laid before them, there was a conversation, according to that testimony, in which Roop Sing applies to Seeta Ram, and requests that he will pay the debt to Mootecchand.

Then the allegation on the part of the appellant is to account for these sums, or rather the principal sum ; that, in order to pay that sum, he produced twenty thousand dollars, and, I think, 49,000 rupees in specie. This sum in dollars was produced at two different times (the sum of 10,000 and 10,000), and then the sum for which those dollars were sold is stated ; and the allegation is, that he gave those dollars to a person who was the agent of Roop Sing, to sell those dollars in order that the produce of those dollars, together with the sum of rupees in specie which he had advanced, should be paid into the Treasury of the Rajah of Benares. Of those two sums of 10,000 dollars, one was sold for the sum of 21,431 rupees 4 annas, which, with the 4,900 rupees being added, will make 26,330 rupees and a fraction : the other 10,000 dollars produced the same sum, which altogether amounted to 47,762 rupees ; and that is said to have been paid into the Treasury of the Rajah of Benares. Now, that the sum was paid in, appears from the accounts of the Treasury. But was it paid in by Soobunslal, the agent of Roop Sing, he being the creditor of Roop Sing, or was it paid in by Seeta Ram, he being the creditor of Roop Sing ? That appears to be the substantial question between the parties.

It is alleged by the plaintiff that he furnished that money. Now, that he furnished the money in dollars, appears to be made out by the parol evidence upon that subject also ; because the parol evidence states not only an application made to Seeta Ram to do it, but it states that sums of money were brought in bags, apparently corresponding to this amount, from the kothee of Seeta Ram. That, of course, is considered as corroborative evidence upon the subject. It appears clearly that Seeta Ram continued to be the banker of the Rajah. It appears that there were accounts between them, debtor and creditor ; and it is not denied that the dakhilas were made on the part of this house of Seeta Ram, and the Rajah is answerable for those.

Then it is alleged that it in fact has been paid off. We have, upon that subject, the evidence, in addition to that which was laid before the Provincial Court, of Sree Kishen Doss. His attention was directed to these accounts, and no doubt he does take upon himself to say, looking at these accounts, upon the result of these accounts, that the debt has been paid off. But is that evidence that Sree Kishen Doss has given, evidence of facts to which he speaks ; or is it not a commentary upon the accounts which are laid before him, from which he draws the inference that the money has been reimbursed to Seeta Ram ? This evidence of Sree Kishen Doss, as well as all the accounts from these different houses and all the parol evidence, was brought up and laid before the Court of Sudder Dewanny Adawlut. I am not prepared to say that there may not be doubts in this case, or that there may not be suspicions, but the Court of Sudder Dewanny Adawlut, after having examined all these accounts and all this evidence, came ultimately to the same conclusion that the Provincial Court had done ; and we ought to be able to say that we can see clearly there is some point in which that Court was wrong, before we can take upon ourselves to reverse that decree. Their Lordships are of opinion that they are not able to see, in the circumstances brought before them, that there is any clear distinct point upon the merits (and it is a question turning upon the facts and merits) upon which they can lay their hands, and say that the decision of the Court below is wrong ; because, after examining all that evidence, the Court of Sudder Dewanny Adawlut has come to that conclusion, and their Lordships see nothing to induce them to reverse it. Great stress has been laid on the admission of Soobunslal and Muthra Doss to participate in the profits of these transactions ; but they were not partners

in the house of Secta Ram; and if that house was employed by Roop Sing as his bankers, an agreement between the house and certain other persons, that the profits of particular transactions should be shared between them, would not form an objection to a suit by Secta Ram to recover the balance due from Roop Sing to his house.

The opinion of their Lordships therefore is, that the decree of the Court of Sudder Dewanny should be affirmed, as far as regards the principal and interest which they have decreed to be due to the plaintiff in the suit, but without the costs of the appeal to the Sudder Dewanny, and it should also be without the costs of the present appeal.

Judgment below affirmed, but without costs.

The 11th February 1834.

Practice of Privy Council (as to judgments from Courts in India.)

On Appeal from the Sudder Dewanny Adawlut of Madras.

Rajah Row Vencata Niladry Row,

versus

Enoogoonty Sooriah and Ramaniah.

The Privy Council will not interfere with a judgment given by the Courts in India in a case where the circumstances are extraordinary, and where, by reason of the contradictory evidence on both sides, it is difficult to come to a satisfactory conclusion one way or the other, and where the party appealing was the party upon whom the *onus* of proof lay, and who has failed to make out his case to the satisfaction of those who had to decide it, and who could have, if he liked, produced fresh evidence before the Appellate Court, or at least the evidence of those witnesses he had himself dispensed with in the Court of first instance.

Sir Thomas Erskine.—THE question that has been raised in this case appears to be one entirely of fact, depending not upon inferences to be drawn from circumstances, upon which the judgments of men may vary, and from which a person at a distance may draw a different conclusion from the person who hears the cause, but it is a question depending upon the testimony of witnesses, upon facts to which they positively depose.

The plaintiff sought to recover property which he said was abstracted by the defendants. He called nine witnesses to prove his case; some of which actually asserted that they saw each individual article carried away by the defendants themselves. Other witnesses were called for the defendants, who positively swore that they saw the defendants go away, and that they did not carry away with them the things they are charged with carrying away. The whole question must depend upon the credit given to these witnesses, the known character of those witnesses, and the mode in which they gave their testimony. Upon these circumstances a tribunal sitting at a distance cannot be so competent to decide as the tribunal who heard the evidence and saw the witnesses.

Now here the Provincial Court Judges, who must be taken to have had these circumstances in view, gave no credit to the witnesses who deposed on the part of the plaintiff, and gave credit to the witnesses on the part of the defendants.

When the case was so determined, the plaintiff took it by appeal to the Court of Sudder Dewanny Adawlut. He knew the ground of the decision in the Provincial Court, for the ground upon which the case had been decided against him is given in very minute detail by the Judge. He knew there were two other witnesses whom he had not examined, with whose examination he had himself dispensed; and he might, when he took his appeal to the Court of Adawlut, have said, "I am not satisfied with the case I made before the Provincial Court. I have other witnesses. I will satisfy you my case was true." When he went before the Sudder Dewanny Adawlut, his case might have received fresh evidence; he was not concluded by the case made before the Provincial Court. It is not like the Courts in this

country, where a case is called on at *Nisi Prius* and the whole cause is tried in a few hours. The party says, "I had no idea my witnesses would have answered as 'they did ;' or 'I was taken by surprise, and I wish to have a new trial.'" But the case was depending three years before the Provincial Court, and afterwards carried before the Sudder Dewanny Adawlut; but still the case was left as originally proposed to the Provincial Court, and two year after the judgment of the Court of Adawlut was pronounced upon the same witnesses and the same documents.

The circumstances are very extraordinary, and it is difficult to come to a satisfactory conclusion one way or the other. But that is a reason why this Court should be cautious of disturbing the judgment given by the Courts in India, where the party now appealing was the party upon whom the *onus* of proof lay, and who has failed to make out his case to the satisfaction of those who had to decide.

On these grounds their Lordships are of opinion they ought not to disturb the judgment given below; the judgment, therefore, will be affirmed *with* costs.

By an arrangement between the parties in the subsequent appeal, it was agreed that the judgment below in this case should be affirmed *without* costs.

The 27th June 1834.

Onus Probandi—Suit by purchaser at sale for arrears of Revenue for rents and profits of uncultivated land brought into cultivation.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sree Raja Row Vencata Niladry Row,

versus

Vutchavoy Vencataputty Raz.

Suit by purchaser of a mootah at a sale for arrears of Revenue for the rent and profits of a hamlet consisting of lands which, when uncultivated, was given by the then Zemindar to the defendant (respondent). Plaintiff alleged, and defendant denied, that the lands were included in the assets upon which the permanent assessment was fixed. Plaintiff being unable to prove that the hamlet in question was included in the Permanent Settlement, his suit was dismissed.

The Chief Judge of the Bankruptcy Court (Mr. Erskine).—THIS was an appeal by Sree Raja Row Vencata Niladry Row, against a decree of the Sudder Dewanny Adawlut at Madras, confirming a decree of the Provincial Courts of the Northern Division.

The subject in dispute is the title to the rents and profits of a hamlet called Juggaputty-nagarum, consisting of one hundred and seventy-seven vissums of land, locally situated within the mootah of Killumpoody, which was formerly part of the zemindary of Peddapoor, within the zillah of Rajamundry.

In the year 1818 the revenue payable by the zemindar of Peddapoor having fallen in arrear, the mootah of Kirlumpoody was sold by the Collector to satisfy the arrears. The appellant became the purchaser, but in 1819 re-sold the mootah to his nephew, Cotagheri Niladry Row, who thereby, as correctly stated in the appellant's case, was substituted for the zemindar of Peddapoor: he would be liable to the Government for all future assessments upon the mootah, and would be entitled to receive from the ryots all the rents which at the time of the sale were payable to the zemindar of Peddapoor. The mootah originally consisted of two villages only, Kirlumpoody and Chillungy. About the year 1784, a jungle lying between the two villages, partly situated in one and partly in the other, was cleared and brought into cultivation, and formed into a distinct hamlet, under the name of Juggaputty-nagarum. This hamlet was at the time of the sale, and had been for some time (but for how long was a matter of dispute), in the occupation of the respondent (Vutchavoy Vencataputty Raz), who had received and appropriated to his own use the rents and profits of the land. Cotagheri Niladry Row conceiving that he was entitled to the rents of this hamlet as parcel of the

mootah of Kirlumpoody, which he had purchased, filed his plaint in the Provincial Courts in the Northern Division against the respondent, and claimed the rents received since the date of the sale, amounting to 6,466 sicca rupees and, anna and 3 pies. The respondent resisted the claim, and defended his right to the rents by virtue of grant made in 1778 by Rajah Sree Vutchavoy Juggaputty Raz, the then zemindar of Peddapoor, by which the Rajah declared that he had given to the respondent, as manyam, one hundred and eighty vissams of land which had never been cultivated, and which was overrun with wood, situated between the two villages of Chillungy and Kirlumpoody, appertaining to the talook of Kirumoor, and that the respondent was to cut down the jungle on that ground, and build thereon a village bearing the Rajah's name. The plaintiff insisted that the zemindar had no right to alienate, as manyam, any land upon which the permanent assessment of the revenue to Government had been fixed, and that, as the permanent settlement had been fixed on the talook of Peddapoor on the basis of the Circuit Committee accounts, and as these lands were included in those accounts, the respondent had no right to the rents of lands which formed part of the mootah, and had been conveyed to him by virtue of the public sale of the zemindar's rights therein.

Upon the hearing of the pleadings read, the Provincial Court required that, amongst other things, the plaintiff should prove that the lands he claimed were strictly jeroyetty lands at the period of the permanent settlement with the zemindar of Peddapoor.

The plaintiff accordingly produced extracts from the accounts of the Circuit Committee for the villages of Kirlumpoody and Chillungy, and other documents, with a view to establish that fact, and to shew that the revenue had been actually collected from the hamlets of Juggaputty-nagarum as part of the mootah of Kirlumpoody; and he also examined several witnesses with a view to prove the same fact, and also to show that the revenue had been collected from the lands in Juggaputty-nagarum for the Government, and that, till within a very few years, the zemindar, and not the respondent, had received the rents of the hamlet.

The respondent in his defence, produced the pottah, or deed, of 1778, the substance of which I have already stated, by which, as he alleged, the Rajah, Juggaputty Raz, conveyed to him the land in dispute, purporting to be signed by the Rajah, but without any attestation. And he examined several witnesses, one of whom deposed to his having himself written the pottah in the year 1778, and seen Rajah Juggaputty Raz sign and seal it; and two other witnesses swore that they were also present and saw it executed. Some of his witnesses also swore to the land having been jungle and uncultivated at the time of the grant, and that the respondent brought it into cultivation and built a tank, and had enjoyed the profits of it ever since. Some of them also swore that the land of Juggaputty-nagarum was not included in the accounts of the Circuit Committee, and that it had never paid any rent or revenue to the zemindar or the Government; and for the purpose of satisfying the Court that the land in dispute was not included in the admeasurement specified in the accounts of the Circuit Committee, the respondent petitioned the Court to have the lands measured, and to compare the actual admeasurements with the quantities specified in the accounts of the Circuit Committee. The Court declined to delay the judgment for the purpose of admeasurement, and on the 18th day of November 1822, pronounced its decree in favour of the respondent, dismissing the plaintiff's suit with costs, upon the ground that the pottah set up by the defendant was sufficiently proved by his witnesses, and was not impeached by the evidence on the other side; and that it was clearly proved by all the evidence, that the respondent had been in possession of the land some years before the sale, and that the plaintiff had failed to make out that the lands in question were either included in the Circuit Committee accounts, or that it formed part of the jeroyetty land of the Peddapoor zemindary when the permanent assessment

was fixed, and therefore, that if the lands were held by an invalid title, it was for the Collector, and not the zemindar, to call it in question.

Pending the proceedings, the plaintiff, Cotaghery Niladry Row, died, and an appeal having been preferred by his widow before the Sudder Dewanny Adawlut, the present appellant was admitted as joint appellant with her, and on the 5th of May 1825, the Sudder Dewanny Adawlut pronounced its decree, concurring in the judgment of the Provincial Court and dismissing the appeal. Against these decrees the present appeal has been made to His Majesty in Council; and the appellant contends that those decrees should be reversed, for the reasons stated in his case of appeal. And it was pressed with great ability in the argument, that as lands *primâ facie* are subject to the payment of revenue to the Government, and as these lands were admitted to be locally situated within the mootah of Kirlumpoody, and to have appertained to the villages of Kirlumpoody and Chillungy, the land must be assumed to have been included in the permanent assessment until the contrary be proved. That the Provincial Court, therefore, was wrong in casting the *onus* of proof on the plaintiff below, and that as the defendants had not made out any legal exemption, the plaintiff was entitled to recover the rents he claimed, or at all events to have his case reconsidered; but that, if the burthen of proof had been properly cast on the plaintiff, that evidence proved that the lands in question were included in the permanent assessment as jeroyetty lands in 1818.

Without entering into the question whether the Provincial Court was right in calling upon the plaintiff to prove that the land in question was jeroyetty land included in the permanent assessment of 1802, or whether the plaintiff below might have been justified in resting his claim upon the *primâ facie* case, which he now contends would have been sufficient to cast upon the defendant the burthen of making out his exemption, it is enough to remark that the plaintiff, in his plaint, rested his case upon the fact that the lands in question were included in the permanent settlement as jeroyetty lands; that when the Provincial Court required him to establish that fact in proof, he made no objection to the course prescribed, but produced documentary and oral testimony to establish the fact alleged in his plaint, which was met by contradictory evidence on the other side; and that, although the decree of the Provincial Court rested mainly upon the negative ground that the plaintiff had failed to prove the fact alleged, yet that the objection now taken formed no part of the complaint upon appeal to the Sudder Dewanny Adawlut, but that the ground relied upon was that the plaintiff below had clearly proved that the lands in question were included in the Circuit Committee accounts. But the most conclusive answer to this objection is found in the judgment of the Sudder Dewanny Adawlut, which proceeded upon the opinion of that Court, that, upon the whole of the evidence before him, the hamlet of Juggaputty-nagarum was not included in the permanent settlement, and that the defendant had made out in proof his title to the rents which the plaintiff might recover. Unless, therefore, it can be shown that the Sudder Dewanny Adawlut formed an erroneous judgment upon that head, it will be unnecessary to enquire whether the burthen of proof rested upon the plaintiff or defendant.

The pottah under which the defendants claimed was sworn to by three witnesses present at its execution, and was only impeached by inference drawn from disputed facts, and both the Provincial Court and the Sudder Dewanny Adawlut considered the instrument satisfactorily proved to be genuine. That the defendant had been in possession of the disputed land for some time prior to the sale, was admitted even by the evidence produced by the plaintiff himself; that he had occupied it from the date of the pottah of 1778, had cleared it and brought it into cultivation, and had always held it clear of rent and revenue, was directly sworn to by several witnesses, whose evidence, though opposed by conflicting testimony, was credited by the Court below.

Now, although the date of the pottah would be an answer at once to any claim set up against the Government, whose right to set aside the grant is clearly reserved

by the Regulations of 1802, yet as, at the date of the grant, the lands are admitted to have been waste and uncultivated, it was perfectly competent for the zemindar to alienate them; and in the letter from the Board of Revenue, upon which the plaintiff relied in his plaint, it is admitted that the zemindar has no interest in any lands excluded from the assets upon which the permanent assessment was fixed.

The permanent revenue was assessed upon the lands included in the accounts of the Circuit Committee. The respondent alleges that the lands in question are not included in those accounts, and therefore that they were not included in the permanent settlement. The accounts are produced: the hamlet is not specified by name, but an explanation is given and evidence produced to shew that these lands were included in the jeryetty lands of the villages of Kirlumpoody and Chillungy. The Provincial Court thought that the evidence did not make out that fact: the Sudder Dewanny Adawlut were of opinion that, upon the whole evidence, they were not included in the settlement.

And their Lordships are of opinion that they ought not to disturb the judgment of the Court below, unless they are satisfied that their conclusion upon this fact is erroneous. They have examined the evidence on both sides with much attention, and have applied to it the observations urged during the argument; and although I am not authorized to say that the evidence convinces their Lordships that the lands in question were excluded from the Circuit Committee accounts, I am directed to express their Lordships' unanimous opinion that there is nothing in the case which enables them to decide that the Sudder Dewanny Adawlut was wrong in coming to that conclusion.

Their Lordships therefore feel it to be their duty to advise His Majesty to dismiss the appeal with costs.

The 3rd February 1835.

Limitation—Regulations II. 1803 Section 18. and II. 1805.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Lall Dokul Sing, son and successor of Bickreemajut Sing, deceased,

versus

Lall Rooder Purtab Sing, son and successor of Lall Isruj Sing, deceased.

This case, which was originally instituted in the Zillah Court at the time when no Regulation for the limitation of suits applicable to the suit existed but Section 18 Regulation II. 1803, but which, having been appealed from the Zillah Court, was pending at the time that Regulation II. 1805 which corrected the Regulation of 1803 was passed, was held to be subject to the Regulation of 1805, as regards the forcible and violent possession taken by the defendants, who could not be allowed to plead their wrong in support of the plea of limitation.

Mr. Justice Bosanquet.—THEIR Lordships are of opinion in this case that the decree of the Sudder Dewanny Adawlut ought to be reversed.

This case involves two questions. The first of them regards the construction and effect of the Regulations of limitation in the years 1803 and 1805. This suit was commenced in the year 1803. In the month of August the plaint was filed in the Zillah Court, and at the time there was a Regulation in operation passed in that year, passed very shortly after this territory had come under the Government of the East India Company. By that Regulation it was generally provided that the suits of which the cause of action had accrued more than twelve years, could not be supported in the Courts to which that Regulation applied; and upon the foundation of that Regulation the Zillah Court decide, and decide very properly, that this suit could not be entertained. From that decision of the Zillah Court, the plaintiff below thought it proper to appeal, and he appealed to the Provincial Court; and at that time it is perfectly true that there was no other Regulation in operation but that of the year 1803, and that has occasioned certainly a singularity in the circumstances of this case, that, at the time when this appeal was instituted,

if that cause had come on for immediate hearing, the effect of that would have been that the Provincial Court, upon appeal, would have been bound to confirm the opinion of the Zillah Court. But even then it must be remembered that an appeal was taken from the Provincial Court to the Sudder Dewanny Adawlut, and therefore that argument goes no farther, for the same course would have prevailed exactly if the Regulation of 1805 had happened to have passed between the decision of the Provincial Court which took place in the year 1806 and the appeal to the Sudder Dewanny Adawlut. We have therefore to consider, what is the true construction to be put upon the Regulation of 1805?

Their Lordships do not think it necessary to enter into the consideration of the general question that has been raised, Whether, where an Act of limitation has been repealed, that repeal taking place at a period in a suit between its commencement and its final determination, is or is not to affect the decision upon appeal, either confirming or reversing the original decree in the suit which took place at the time when that repeal had not been made? because their Lordships are of opinion that this case turns upon the particular words of this Regulation. The Regulation itself provides that the limitation of twelve years fixed by Section 14 Regulation III. 1793, and Section 8 Regulation VII. 1795, and Section 18 Regulation II. 1803, which is the Regulation in question, shall also not be considered applicable to any private "claims of right to any lands, houses, or other permanent immoveable property, if the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent Court of Judicature, shall have acquired possession thereof by violence, fraud, or by any other unjust dishonest means whatever." That is the first case. "Or if such property shall have been so acquired by any other person or persons from whom the actual occupant or occupants may have derived his or their title, and shall not have been subsequently held under a just and honest title (such as inheritance, purchase, fair donation, or any other fair title believed to have conveyed a right of possession and property) during a period of twelve years antecedent to the time of preferring a claim of right thereto in a competent Court, provided that such violent, fraudulent, unjust, or dishonest acquisition be established to the satisfaction of the Court in which the claim may be preferred." Throwing, therefore, the burden of that proof upon the party who claims the benefit of the exception from the general provision in the Regulation; and then it goes on to say: "Or if the suit be appealable to the satisfaction of the proper Court of Appeal." Now, in construing those words, we must have some reference to the state of things at the time, or shortly before the time, when this Regulation passed. It has already been observed that the territory to which the property relates had very shortly before come under the Government of the East India Company, at the time the first of those Regulations passed in 1803. Previous to that time there were no Courts established of such a description as the regular Courts which have been established by the Company. I do not mean to say that there were no Courts of some kind, at least under the Government of the Sircar, or whatever the Government of the country might be at the time, but there were not Courts established of the description which have since been established in this territory. The first Regulation is made almost immediately after those parties came into possession of the property, and then, within two years, it is found necessary to correct that Regulation, because it was found that the Regulation was much too general, and a very short period elapsed during which suits could be commenced in any of those Courts; and I conceive, therefore, that the meaning of those words is this (and I believe their Lordships entertain no doubt upon it), that if the suit had been instituted and in the course of appeal in the interval, the benefit of this correction which was made of the original Regulation should be given to parties who availed themselves of that; and therefore it is that their Lordships think that this case, which was originally instituted in the Zillah Court at the time when no Regulation existed applicable to the case but that of 1803, but

which having been appealed from the Zillah Court, was still pending at the time this Regulation of 1805 passed, is still subject to the Regulation of 1805, and that Regulation is to be taken cognizance of by the Court of Appeal.

If that be the true construction of the Act, the question is, Whether that Regulation, so corrected, does or does not apply to the present case? With respect to that there is no question; nor is it a matter of dispute that this property, which is the subject of the present suit, was taken possession of by force and violence. On one side, it is said, by the illegal force and violence of the person who was the ancestor of the present respondent; and on the other side it is said, though true it is it was taken possession of by force and violence, yet it was by act of the reigning Government, and he was put in possession of it by the reigning government. That certainly, if it was so, would be fairly within the meaning of this exception.

The facts of the case, then, are these. Lall Oodwunt Sing took possession of this property about twenty-six years before the time when this suit was instituted, or before the Regulation passed; he continued in possession of that property for a considerable length of time; he died ten years before the suit was instituted; and after his death, the person who was the immediate respondent, Lall Isruj Sing, succeeded him.

It is contended, however that, although the father had not died more than ten years before the institution of the suit, yet that there was evidence from which we are called upon to draw the conclusion that he was in possession previous to the death of his father for some years. And certainly there are some witnesses, on the part of the respondent, who speak to that circumstance; and therefore it is said that he would come within the second provision of this Act, even supposing the father to have not been *bona fide* in possession himself; that he would be the person succeeding under a title which he might suppose to be a fair title. With respect to that fact, it is remarkable that neither of the Courts at all proceed upon any such ground, and the decree of the Court of Sudder Dewanny Adawlut expressly proceeds upon the ground that he states that he was in possession for ten years; and I think we cannot ourselves, looking through the evidence in this case, feel ourselves warranted in drawing any other safe conclusion than that of the respondent having come into possession upon the death of his father. It has already been observed by his Honor the Vice-Chancellor, in looking through the testimony of the witnesses, that the periods of time to which they respectively depose are so different that it is quite impossible to place any reliance upon any definite number of years to which they are speaking, and therefore I think we must assume that the Court of Sudder Dewanny Adawlut came to the conclusion that the possession was a possession of ten years.

Then comes the question, What was the nature of the possession of the father and son; that is, Lall Oodwunt Sing and Lall Isruj Sing? The father came into possession, it is admitted, by a force which took possession of this property and pulled down the buildings; and on one side it is said that this was by a force of his own; and on the other it is said that it was by a force of the Government, who directed him so to do, and that he was acting therefore under public authority. The Court of Sudder Dewanny Adawlut, in their judgment upon this subject, state the length of possession to have been, I think, a period of twenty years, and the son to have been in possession ten years. They say this: "It was clearly proved that Lall Oodwunt Sing, the grandfather of Lall Isruj Sing, the father of the appellant, was confirmed, with the approbation of the Nawab's Vizier, the then ruler, in the possession of the zemindary in dispute 1190 Fusly, a period of twenty years before the present suit was laid; and from the evidence of witnesses, and the interrogations put to both parties, it is clear that Lall Oodwunt Sing in 1200 Fusly, a period of ten years before the suit was instituted, having died, Lall Isruj Sing, in right of inheritance, remained possessed of the zemindary left by his grandfather,

"from that time up the date of the plaint in this cause." So that they state him to have come in by inheritance, and they rely upon the nature of the inheritance by the father.

The other ground which is relied upon for shewing the possession of the father, was his *perwanna*, which is stated in this decree. In the argument it is not denied that the effect of this *perwanna* is, a mere matter of revenue, and that the object of this is to have the revenue collected from the person, whoever it may be, who is in possession of the *zemindary*. That this person was in possession of the *zemindary* and he had been so a considerable time, there is no doubt; but it is clear that the party himself did not rely upon that *perwanna*. Though it was undoubtedly a part of the evidence to shew that he was the person who was in possession at that time, yet that is not the evidence upon which he professes to rely, for the purpose of shewing that that possession commenced legally, that is, by the authority of the State, although he would be entitled to claim the benefit of it. For that purpose he puts forward the order of the State, which he calls the *Royal Sooka*, for the purpose of shewing how his possession commenced, and this is the document which is set forth in the papers bearing on the envelope the seal of *Ahmud Shah Badsha Ghazi*, and is addressed to *Lall Oodwunt Sing*. It is in these terms: "From the *urzee* of *Kajeh Ahmud*, who was sent with orders from the Presence, for the purpose of expelling *Bickremajeet* and razing his forts, as a punishment for plundering a merchant's property, it is ascertained by the *Huzzoor* that you accompanied the *Khajeh* aforesaid, and used great exertions in expelling him and destroying his forts: the *zemindary* of *talook Deya* is therefore conferred by the *Huzzoor* on you; and it is expected that, after having offered your thanks for the favor conferred, and having settled the *malgoozary*, you make such arrangements that no mark of him or his family remain in that district, that it may be an example to others also that you remain obedient to the will and orders of the *Huzzoor*." This is the execution which this person is directed to put in force for the purpose of punishing a public offender.

Now, that document is confessedly tested: an investigation into its character has been instituted, and that document turns out to be a palpable forgery. Under these circumstances, what reliance can be placed upon other testimony? On this part of the subject there is a good deal of testimony with respect to the manner in which this property was originally taken possession of, and the period at which it was taken possession of. That it was taken possession of by force, the witnesses on both sides agree. The witnesses on one side say it was entirely by act of *Oodwunt Rooder Sing* himself; the others say that he was accompanied by soldiers, who were part of the Government force. Now, upon that testimony, supposing it to be equally balanced, we have a fact by which they attempt to turn the balance, and that is forced.

Under these circumstances, therefore, it appears to their Lordships that they can entertain no doubts that this was an act of wrong, and being an act of wrong, the party in possession who committed that wrong is not entitled to the benefit of the limitation, and that the party who came in upon his death not having been in possession under any supposable fair inheritance, he is not entitled to any favor. Their Lordships are of opinion, therefore, that the decree of the *Sudder Dewanuy Adawlut* must be reversed.

Mr. Millar.—I would apply to your Lordships that the appeal may be reversed with costs. In the last part of the decree they have ordered us to pay all the costs.

The Vice-Chancellor.—We have simply affirmed the decree of the Provincial Court.

Mr. Wigram.—But then we shall have to pay the costs of appeal to the *Sudder Adawlut*, because the whole thing has been carried on by forgery.

Mr. Justice Bosanquet.—No, not the whole; there is forgery that is set out.

The Vice-Chancellor.—The decree of the Provincial Court seems to us to be right, and that decree must be affirmed, and the decree of the Sudder Dewanny Adawlut reversed.

The 4th February 1835.

Devise of zemindary to eldest son—Stipends to younger children (Reduction of)—
Principle of Natural Equity (when applicable).

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Moharajah Grees Chund Roy,

versus

Shumbhoo Chund Roy.

A zemindar bequeathed the whole of his zemindary to his eldest son, leaving certain fixed stipends to each of his other children. The settlement upon the younger children was originally a fair one, but in consequence of events which had subsequently occurred, the Court considered that there ought to be a reduction in the stipends. It was alleged that the value of the zemindary had gradually been reduced by a sale of some portion of it; but as it was nowhere alleged that the sale had been occasioned by bad seasons or acts of God, and not by the neglect of the person through whom the appellant claims, the question of Natural Equity was held not to have arisen.

The Right Honorable Thomas Erskine.—THERE have been many points of law raised and discussed in this case, which certainly would be of great importance, not only as to the zemindar himself, but also to every branch of the zemindar's family; and if it had been necessary in this case for their Lordships to express any opinion upon those points of law, they would have taken time to consider this case, in order that the decision of those important questions might receive the careful attention which they demanded; but it appears to me that the facts in this case lay no sufficient foundation for the decision of those points.

It appears that this will, which was made by Rajah Kishen Chund, the great-grandfather of the present appellant and the grandfather of the respondent, bequeathed the whole of the zemindary to his eldest son, leaving a certain fixed stipend to each of his other children. Now, it is argued in this case that Kishen Chund had no authority by the Hindoo law to give such stipends as he then allowed, because they were excessive; but all the facts of the case disproved that assertion: nor was it ever alleged in the Court below that that was an excessive allowance, because it seems to be admitted that, at the time it was made, it was a fair stipend to be allowed, considering the extent of the zemindary. So far from being disputed, it appears to be acquiesced in for a considerable time. Iswar Chund himself admitted that the zemindary was of sufficient extent to warrant the payment of those different stipends, and he continued to pay them and promised to pay them.

Now, their Lordships do not say that the promise by Iswar Chund would of itself bind his heir, so as to make him pay a stipend which was avowedly unfit and excessive; but it amounts to an admission that the allowance made to the younger children was not excessive. And then, if the present appellant meant to set up that, in point of fact, that was an excessive allowance, he should have made that point in the Court below. But no such point appears to have been made, either in the Zillah Court or in either of the Courts of Appeal, that the original settlement upon the young children was excessive. On the contrary, it seems to have been admitted that it was originally a fair settlement; but it was considered by the Court that, in consequence of events which had subsequently occurred, there ought to be a reduction in those stipends which originally were proper.

Then a number of cases have been cited to shew us that English equity applies to this case. Cases of contract have been cited which have been determined according to the Civil law and the law of Scotland and other countries

where a party has made a contract for the letting of land at a certain rent, which, according to the intention of the parties, is to be proportionate to the profit of that land, and where, without any default of the tenant, the profits are reduced; and in those cases the proportion of those profits to be paid to the landlord has been held to be reducible also. It appears to me a perfectly distinct proposition from that which is now raised.

In order to raise a question in this case, the appellants should have made out clearly that the value of the zemindary had been reduced, and had been reduced not by any default of his own or of those through whom he claims, but by an act of God, as in those cases, in order to raise the question of Natural Equity. But there is no such proof, there is no such allegation even: there is nothing but the vague, indefinite assertion, that by degrees the value of the zemindary has been reduced by a sale of some portion of it; but whether that sale had been occasioned by bad seasons, or by neglect of the person, or by any other cause, is nowhere alleged. It is not even alleged to have taken place in consequence of bad seasons. So that there really are no materials upon which their Lordships can enter into any discussion of the principle of the law upon which the Counsel for the appellant have sought to place this case.

But it has been said that the Court below have not decided this case; that, upon reference to a former decision, they were satisfied with that, without entering into any discussion of the points of law now raised. Why, for the very reasons I have given before, those facts were not sufficient to raise the point of law. There seemed to be nothing in the case but the amount of the arrears and the amount of payment; and then the consequence is that, as that question had been dismissed before in the case in which the father was originally a party, when the son of that father, the present appellant, afterwards came, as no new facts are brought in and no new point raised, the only question seems to be the amount of the arrears.

Then it is said the decree is erroneous, because they made the party personally responsible, instead of making him responsible only to the amount of assets. But, in the first place, it is not contended here that the value of the inheritance is not equal to the payment of all the arrears; but it is said that, if those are paid, the zemindar will get very little. But there was no such objection raised in the Court below. When the Zillah Court pronounced its judgment, and the present appellant appealed from it, he never made the objection that the original decree made him personally responsible, but he discussed it solely upon the general principle upon which he has discussed it here, for which he has laid no foundation in point of law; and it is too late now to call upon His Majesty in Council to reverse a decree pronounced twenty-nine years ago, upon the ground that it made the party personally responsible, when he himself, up to that time, had never made any such objection: and it now appears to be a point raised rather by the ingenuity of the learned Counsel than by any suggestion of his own. It appears, upon the whole case, that he was not likely to have any property that was not actually derived from his father. Their Lordships think there is no ground for disturbing the judgment, and therefore that the decree should be affirmed with costs.

The 6th February 1835.

Hindoo Law of Adoption—Adopted son succeeds lineally and collaterally.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Sumbhoochunder Chowdry, son of Shamchunder Chowdry, and Rooderchunder Chowdry,

versus

Naraini Debia and Ramkishore.

According to Hindoo Law, an adopted son succeeds, not only lineally, but also collaterally, to the inheritance of his adoptive father's relations.

Mr. Baron Parke.—THIS case comes before their Lordships upon an appeal by two persons of the names of Sumbhoochunder Chowdry, and Rooderchunder Chowdry against the decree of the Sudder Dewanny Adawlut, which was passed in favor of the respondent, Naraini Debia, and her adopted son, Ramkishore, in a suit in which the plaintiffs below sought to recover a fourth part of the revenues of the zemindary of the pergunnahs Mymensing and Zuffershye.

The decree of the Sudder Dewanny Adawlut, against which this appeal is preferred, affirmed the decree of the Provincial Court, which affirmed the decree of the Zillah Court of Mymensing, and the question is, whether this decree of the Sudder Dewanny Adawlut is wrong?

Their Lordships are, in this case, placed under the necessity of deciding a question of Hindoo law, which, as far as we learn from the proceedings in the case, has not been expressly decided by the Court below, because the Zillah Court decided the case upon a ground which their Lordships think cannot be sustained.

The way in which the question arose appears to have been shortly this. Upon the death of Kishenkishore, which took place in the year 1773, his first wife, Ruttun Mala, adopted, or is said to have adopted (but whether she did, or not, is immaterial to the present question), a person of the name of Nundkishore, and he remained in possession of the property in question three or four years after the death of the widow. He died in the year 1786-7. Upon his death in that year, Joogulkishore, who was the father of Hirkishore, commenced a suit against Naraini Debia, who was then in possession, in right of her adopted or supposed adopted son.

This took place in the year 1788, and during the progress of that suit the present appellants were allowed to intervene as parties. That suit was brought to a termination, and the decree of the Court in 1793 was that one moiety of the property in question belonged to Ramkishore, one of the present respondents, and that the appellants were entitled to the other moiety. Against this decree there was an appeal to the Provincial Court by Naraini, the present respondent, and upon that appeal a decree was pronounced, by which the decree of the Zillah Court was reversed, upon the ground that the intervention of the appellants was illegal. The whole cause was put an end to, and liberty was then given to all parties to commence fresh suits.

In consequence of that, it appears that fresh suits were instituted. The first suit instituted was by Hirkishore, who was the son of the adopted son of the brother of the father of Ramkishore; and the other suit was instituted by these appellants, who were the sons of the brother of the half blood. After the whole of these suits had proceeded a certain way, an order was made to stay the proceedings in the second suit till the termination of Hirkishore's suit, and that is one of the present causes of complaint. Accordingly, the suit of Hirkishore proceeded, and finally the Court decided that the claim of Hirkishore was well founded, and rejected the claim of the appellants. After that there was an appeal to the Provincial Court of Dacca, and that Court reversed the decision of the Zillah Court so far as it recognized the right of Hirkishore, and affirmed so much of it as related to the rejection of the appellant's suit.

From this decree there was an appeal to the Sudder Dewanny Adawlut, and the Sudder Dewanny Adawlut decided the case upon the ground that it appeared to be clear, upon the evidence, that Naraini Debia, the widow, had adopted Ramkishore, and that therefore the claimant had no title to the estate. It proceeded upon the ground that Naraini had adopted Ramkishore.

Now, the complaint made by the appellants is that they have never been heard upon some questions of fact, and have never been heard also upon some questions of law. So far as their objections rest upon their not having been heard upon any questions of law, it appears to their Lordships that there is no ground for the complaint, because the law is a matter upon which evidence is not to be received.

But the Court is to determine all questions of law, and when questions are submitted to the Pundits, the object is not to examine them as witnesses, but to consult them upon matters of which they are supposed to be fully cognizant; therefore there is no ground for the complaint of the appellants that they were precluded from giving evidence upon the points of law in the suit in which Hirkishore was a claimant.

But it is said that they may have been prejudiced by not having had an opportunity of litigating the questions of fact; and upon that point their Lordships are of opinion the proceedings of the Court were irregular. They had no right to decide upon a question of fact, in which the appellants were interested, behind their backs, and in a cause in which the appellants were not parties.

The Provincial Court and the Court of Sudder Dewanny Adawlut appear to have decided a very important question of fact, in which the appellants are interested, in their absence, for they have decided upon the evidence adduced, which was not in this suit, that Naraini had adopted by the directions of her deceased husband Ramkishore, and upon that ground they had decided that Ramkishore was entitled to the inheritance. That matter the appellants ought to have had an opportunity of contesting, and they have been precluded from doing it by the decision of both the Courts below; and if it had turned out that the appellants were entitled to the succession, it would have been a just ground for reversing that decision.

But although they have alleged, in both their petitions of appeal, that Naraini was not authorized to make the adoption, and that the adoption did not take place according to the Hindoo law, yet nevertheless, if we see that the judgment is rightly founded upon the Hindoo law, upon a question totally independent of that, and that these appellants have no right to succeed to the property, although the Court have put the judgment upon a wrong ground, we should say that the appellants are not entitled to succeed; and if they are not entitled to succeed according to the Hindoo law, their Lordships must give judgment against them.

It is an admitted fact in the case, and is not disputed by the appellants themselves, that Joogulkishore was himself an adopted son. That is the first fact admitted in the first page of the Appendix. They say that Joogulkishore was the adopted son of Kishengopal Roy; and in the course of the suit it appears that the Court asked this question of the pleaders on the part of the plaintiff, "Is Joogulkishore Roy the adopted son of Kishengopal, or not?" and the answer is, "He is the adopted son of Kishengopal Roy." That was in answer to a question put by the Court. That fact is therefore distinctly admitted by the appellant, and the question is, Whether, that fact being admitted, the appellants can have any right to succeed to the property in dispute?

It may be admitted that, in the answers given by the Pundits, there is not an agreement upon the question of law, Whether the son by adoption can succeed collaterally to the relations of his father? There is a difference of opinion, but the weight of the opinions is that he may so succeed.

Then there are opinions cited by the appellants themselves to the same effect, and the learned Counsel has cited the *Daya Bhaga*; and there is another authority to the same effect in *Colebrooke's Principles of Hindoo Law*, page 177, and again in *Sutherland's Synopsis*, page 219, where it is expressly laid down that an adopted son not only succeeds his adopted father, but also succeeds collaterally; and there are other authorities to the same effect. The *Mitakshara* is cited to the same effect.

Now, these are very strong authorities in favor of the proposition, that an adopted son is to succeed lineally and collaterally; and the reason pointed out, according to the Hindoo law, is that he becomes for all purposes the son of the father.

Now, coupling those authorities with the opinions given by the Pundits in the course of the cause tending in the same direction, it appears to their Lordships, unless some authorities are cited to the contrary, and the learned Advocates for the

appellants have neither of them cited a single authority from the Hindoo law of a contrary tendency, the whole of their argument is founded upon this, that, by the course of the proceedings, they have been prevented raising the question of Hindoo law. But no proposition is more clear than that this Court is bound to take notice of what the law is in that country. We are bound to take notice of it, and decide it as well as we can. We have not the advantage of the decree of the Court upon the Hindoo law, and we are not so sure we are right, because this decree has gone upon a different point; but it is upon a point that, to some extent, affirms the notion that their Lordships are about to adopt, for the decree adopts the notion that a brother may succeed to his brother collaterally. There may be a distinction between a succession in the direct line and a succession to collateral relations; but the decision is a decision in support of the proposition of Hindoo law, which their Lordships now are about to recognize. Their Lordships think, therefore, looking at these authorities and the weight that is due to them, that an adopted son succeeds not only lineally but collaterally to the inheritance of his relations; and if so, these appellants are not in a condition to succeed, because they have distinctly admitted in their own pleadings, and by the answers of their own pleaders given to the Court, that an adopted son of the whole blood was in existence at the time of their suit being commenced. If an adopted son of the whole blood is in the same situation as the natural son of the whole blood, then the only remaining question is, whether the brother of the whole blood succeeds in preference to the half blood? Upon that point there is no dispute, for the authorities are uniform.

For these reasons it appears to their Lordships that the ground upon which the Courts have proceeded is not a correct ground, because they have proceeded upon a fact which the appellants had no means of litigating; yet they are right upon the point of law that the appellants are not entitled to the property. The decree of the Court of Sudder Dewanny Adawlut will therefore be affirmed, but without costs.

Decree of the Court below affirmed, without costs.

The 13th February 1835.

Adoption by Parsees—Prior will Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Homabae, widow of Dosabhaec,

versus

Punjabhaec Dosabhaec.

An adoption made by a Parsee immediately before his death would render extremely improbable the execution of a will by him a very short time previous thereto, and therefore call for a very clear proof to establish its existence.

Although in cases of adoption by Dhurm-putr (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the Dhurm-putr.

In the absence of any such writing, and upon the whole evidence, the adoption in this case was pronounced to be as a Paluk-putr, and not merely as a Dhurm-putr.

Mr. Justice Bosanquet.—THEIR Lordships are of opinion in this case that the decree of the Sudder Adawlut ought to be affirmed, and the circumstances of the case I will proceed to state.

The person to whom the property belonged, the subject of this suit, died on the 25th of June 1820. Upon the 21st of November in the same year, the respondent in this suit, Punjabhaec, preferred his claim in the Zillah Court of Surat, in which he claimed to be entitled to the property of the deceased, as his adopted son and heir. Of course, in his plaint he states the relationship that he bore to the deceased, and he states that, in right of his relationship, he performed all the usual ceremonies according to their faith and religion; and it may be justly observed that, if he was

the adopted son and heir, he would, in respect of that character, be the person to perform the ceremonies, the adopted son being treated as the son of the person who adopts him, to all intents and purposes, if he is Paluk-beta, as if he was the natural-born son, unless there is a restriction of the nature mentioned in this case, and he was only Dhurm-putr.

To this plaint the defendant (the now appellant) put in an answer upon the 20th of January 1821. In that answer she sets up a will. The proceedings go on to a rejoinder, and at that period of the cause, the cause is referred to arbitration; and pending the arbitration, in the year 1822, an application is made on the part of two brothers, Ferozshah and Ardaseer, to the Zillah Court of Surat, requesting that this arbitration may be suspended. The Court, however, declined acceding to that proposition, and then an award was made. That award was appealed against to the Sudder Dewanny Adawlut, and those two persons, Ferozshah and Ardaseer, also took a part in that appeal. The award was ultimately set aside, upon the ground that the original submission to the award was not duly and formally made, and that, consequently, the award itself fell to the ground. The ground of the application to set it aside was, that there had been partiality on the part of the arbitrators, who appear to have thought that the present respondent was the adopted son, and that the will was invalid. However, the Court of Sudder Dewanny Adawlut, though they speak of the conduct of the arbitrators themselves, do not profess to proceed upon that ground, but set it aside upon the ground that the original submission was invalid.

Then the suit proceeded by the present respondent in the Zillah Court of Surat, and several witnesses were examined for the purpose of establishing the will, and also to establish the adoption; and Mr. Anderson, the Judge of the Zillah Court of Surat, was finally of opinion in favor of Homabae, the present appellant, that the adoption was not established and that the will was.

This case is then appealed to the Sudder Dewanny Adawlut, and there was a division of opinion in that Court. The Second Judge is of opinion both that the adoption is established and that the will is not established, but expresses a strong opinion that it is a forgery. The Chief Judge is of the opinion that was entertained by Mr. Anderson, and directly opposed to the Second Judge. He was of opinion that the adoption was not established and that the will was. The third Judge was of opinion that the adoption is proved and the will is not satisfactorily established; and he throws out an opinion, in point of law, in the reasons he gives, that the will, if established, would not have the effect of setting aside the adoption; but, upon the point of fact, he gives an opinion that the adoption is made out, and that the will is not satisfactorily established.

The question for consideration here is, Whether the opinion of those two Judges of the Sudder Dewanny, under those circumstances, is wrong and ought to be set aside?

Several points have been raised, both upon the law and the fact. The questions of law have been, Whether a will made by a Parsee to dispose of his property can be valid for the purpose of defeating the right of his heirs? and another question is, supposing such a will can be made, whether would such a will, or not, be revoked by the adoption, if the adoption was clearly proved subsequent to the will?

It does not appear to their Lordships necessary to decide either of these questions of law, for whatever opinion they may entertain upon either of these subjects upon these papers, it might be inconvenient to express a decided opinion upon points of law which are at all doubtful, where the question itself may be decided upon the matters of fact that appear upon these papers. It appears, I must say, that the general effect of a will in disposing of the property of a Parsee, as well as of other persons who die leaving a clear will disposing of property independent of adoption, seems to have been assumed in the case, and it can scarcely be said to be denied by either of the parties.

The substantial questions are of fact. *First*, whether the adoption has been proved ? and *secondly*, whether the will has been established ?

If the adoption before the death of the testator is clearly made out and established at the time that the adoption in this case was alleged to have taken place, namely, almost immediately before the death of the testator, it would render the execution of a will by him a very short time previous to that, extremely improbable. Without entering into the question of law, whether such an adoption made regularly and with ceremonies would have the effect of revoking a will, which it is not necessary to decide, this may be stated, that it would render the existence of such a will improbable, and therefore call for very clear proof to establish its existence. It is in that way, therefore, that the adoption will have its effect upon the evidence respecting the will.

With respect to the adoption, it will be observed that the case stood in a very different situation in the Sudder Court to what it did in the Zillah Court in Surat.

Several witnesses were called in the Zillah Court, and among others that important witness of the name of Dunsha Eduljee, a Parsee, a neighbour, who was called in when the adoption took place, the day before his death. His testimony is clear and distinct upon that subject. Several witnesses are also called in by the Sudder Dewanny Court, who state that the facts took place as that witness states ; and that would be undoubtedly and clearly a valid and legal adoption to all intents and purposes.

In examining the testimony given by the witnesses in the Court of Sudder Dewanny Adawlut, it appears that the persons spoken of as having been present at that alleged adoption were Punjeabhaee himself, the adopted son, Dosabhaee the adopter, the father of the adopted son, the mother of the adopted son's wife Moteebae, and Eduljee Dunsha, who had been examined in the Zillah Court, and another person of the name of Peshtunjee Khaoosjee, who was also present, but not being a resident at Surat may account for his not having been examined in the original suit. At all events, he was not examined in the original suit ; and it is remarked by the Judge that neither party thought it necessary to call him, and he was not called by the Judge of the Zillah Court ; but the sitting Judge of the Sudder Dewanny thought it necessary to call him, as a person spoken of originally as one of the persons present, and upon being examined he gives a most distinct account of what passed. He states that the adoption took place just in the manner proved by Eduljee Dunsha. Therefore the Court, who decided in favour of that view of the subject, had that additional important evidence before them that the other Court had not.

In addition to this testimony there is the testimony of Darashah, the father of the respondent, who may be supposed to have a bias in favor of his son, and Moteebae, who had a bias in favor of her daughter, who married him. But there are, besides those two, other witnesses who are of importance, and speak to the admissions of the appellant herself upon this very subject ; and one of these is the sister of the deceased, whose name is Koonwurbae. She says, "when Dosabhaee was dead, Punjeabhaee and Homabae came to the room which is occupied by the women when they are impure, and the former said, 'That is the alleged adopted son ; I will perform Dosabhaee's funeral ceremonies.' She replied, 'You are his heir, his son-in law, and the property belongs to you. I have now some of his money in my possession ; I will pay the funeral expenses, and you must borrow some more and bring it to me, and I will give you an account of the money.'"

Now, this is the testimony with respect to the adoption before the death. There are, then, circumstances that took place, respecting which there is no doubt and no contradiction, namely, that three days after the death of the deceased there was a meeting of the caste, and at that the meeting there were present, among other persons, the two brothers, Ferozshah and Ardaseer, the cousins of the alleged adopted son. They, as being the descendants of one of the three brothers, of whom the

deceased was one, were present at this meeting ; and the priest being there, the tunderooste was read, and it was read, as it is admitted by all, in the name of the person who claims to be the adopted son.

Now, there is some contradiction between the witnesses as to anything being said about its being Paluk or not. Some of the witnesses say he was expressly declared to be Paluk, or adopted son generally : others say, nothing was said ; but all agree in this, that no remark was made, and no mention was made of its being Dhurm-putr. Homabae herself was manifestly present, as appears by the testimony of one of the witnesses referred to, and she made no objection to the tunderooste being read in general terms. It is said by one of the witnesses, no distinction is made as to the mode of reading, whether it is Dhurm-putr or Paluk ; but inasmuch as adoption generally would imply that the adopted son is heir of all, and the adoption by Dhurm-putr is an exception, one should expect, if there was any exception made, it would be notified.

Now, it does appear that, although it may not be indispensably necessary, as a matter of law in Dhurm-putr that a declaration should be made on the third day after the decease, yet it does appear it is usual so to do ; and not only is it usual to make such a declaration, but that it is usual, in case of Dhurm-putr, to take a writing. Now, no writing is produced, or pretended to have been given, as an acknowledgment by Punjeabhae that he was merely adopted as Dhurm-putr. We have had instances stated where a writing was taken in this family, and another instance where, it having been given, it was notified at the Parsee church ; and therefore it is of importance to notice that what was usual was not observed.

Under all these circumstances, their Lordships are of opinion that this is very strong evidence to satisfy their minds that the Court of Sudder Dewanny has done right in coming to a conclusion that there was, in point of fact, a general adoption of Punjeabhae, the respondent.

Then the next question is, was there, or was there not, a will ? Now, we have to consider on this occasion the evidence given, and also the conduct of the parties who claim under it.

The answer was not put in until the 20th of January 1821, the plaint having been filed on the 21st November. It appears there had been some rumour of an intention to set up a will, and application was made by Punjeabhae the original plaintiff, calling upon Homabae to produce this will and file it ; and an order was made upon the very same day, by which she was directed to file it immediately, and further with an intimation that, unless it was filed immediately, it would not be received. This was nine days before the answer was put in and the will is not produced till then ; and then the will is produced at the same time as the answer, and the reason given for the delay in putting in the will (which had never been made public, except as it may have been shewn to private individuals, it was never made public till the 20th of January 1821), and the reason given was that she was in a state that prevented her from complying with the order of the Court. If that excuse be true, it could not prevent her the whole time ; and there is the evidence of persons acquainted with her, females of the family, who state positively that she was not in that state at that time, and had not been for some time before. There is further the evidence of one of the women, who says that, when the messenger came and called upon her to produce the will, she got up and went into a corner. This is the conduct of this person with respect to this will ; and when the tunderooste is read declaring him to be the adopted son, she makes no mention of any disposition in her favor ; she makes no objection to the ceremony ; and when there is an order for the will being produced, she delays producing it for several days, and at last gives a reason for it not consistent with truth.

Then we come to examine the will itself. That will purports to have been made on the 2nd of June 1820, that is, twenty-three days before the death of the testator. It purports to be attested by two witnesses, and it is upon a stamp of

fifty rupees, the proper stamp for such a will; and, in order to establish the probability of this will having been duly executed at the time, a witness has been called, the Stamp Darogah, to prove that a stamp corresponding with the stamp upon the will was purchased at that time. His evidence upon that subject is, that he finds by a book, or rather by some loose sheets, not by the book itself, that a stamp was purchased, as appears by an entry in the book, or rather upon certain loose sheets, where it is written down, "A stamp paper, No. 98, purchased on the 1st June 1820, by Rustumjee for Dosabhaee Bermunkbaee." In the book it is written down as the third class of stamp paper. Now, upon this it is to be observed, we have neither the evidence of the person who bought it, nor of the person who sold it. There is reason to suppose that Rustumjee, the person who bought it, is dead (at least a person of his name appears to be dead), and I will assume for the argument he is dead; but there is no account from the person who sold it; and it is rather a remarkable thing that this document is inaccurate in this respect, that though it appears that the stamp upon the will is of the fourth class, that that which is written down in the book is, that it is the third class. However, the witness says, "A stamped paper, No. 98 of the year 1816, has this day been shewn to me." The stamp entered in the book was No. 98, and was of a corresponding amount; and though there is this mistake, it does afford reason to believe that this was the stamp used on that occasion. But whether purchased by Dosabhaee's order is not established by this paper. However, this is a circumstance, when examining the probabilities, that we ought not to pass over, a circumstance not of any great weight, that there was a stamp purchased at the time of the amount required for this will, by a person professing to come from Dosabhaee, and sold by this person, of whom we have had no account. And then it says it agrees with the Government account. What is the nature of that Government account, or whether it mentions that this No. 98 was sold to this person, we have no very clear and satisfactory evidence. But then, in order to establish this will, professing to be attested by the witnesses who have subscribed it, the witnesses themselves are examined. There is, first, the testimony of Abdool Kajeer Mahommed Churagh, a Mussulman; and in his first deposition, in giving an account of his attestation of this instrument, he does not fix the time, but speaks very loosely of its being a certain length of time before, in very general terms. He says "About four years, or four years and a half ago, Dosabhaee made me sign a will, and the will which I have this day seen has both my seal and signature to it. The circumstances of the case are as follows. I have known Dosabhaee for a long time, and we were in the habit of going to each other's houses. One day Dosabhaee said to me that he felt unwell, and on that account he intended to make his will. I told him that it was proper that he should do so. About 15 days after, this Dosabhaee came with the will in his hand to my house, and told me to sign it." According to this man's testimony, Dosabhaee came to his house with it, and this original deposition states that Dosabhaee was alive at that time. "How many days after you signed the will did Dosabhaee die?" He says, "One or two months, or perhaps a little more." The will being dated the 2nd of June, and the testator having died on the 23rd of June, he is very much out in his statement there. Then, after the testimony of certain witnesses examined on both sides, he is examined again, and he says twenty-three days, or a little more than a month before the death of the testator it was when he signed the will. *

The next witness is a man of the name of Tekundass Doongursee, and he says, "About four years ago I went to Dosabhaee, being a friend of his, for I was in the habit of doing so every year. Dosabhaee shewed me the will, and said that he was in bad health, and on that account he made his will and had got one witness to it; and requested me to sign it also. I did so in Dosabhaee's office." Those two witnesses speak to their having signed the will. Those are the only two that have signed. Then Punjeabhaee Ruttumjee says, "About four years ago

"Dosabhaee made his will in favor of Homabae." That was in 1824, that is the date of his deposition. This man is a Parsee. He says, "The will was brought to him, but he refused to sign it. There were, however, then, two witnesses. The testator told me to read it and sign it." After this he speaks to having seen it, and having seen the two witnesses' names to it, and that the testator told him that two other persons had refused to sign it.

Then there is Mooftoe Gholam Ali, the person whom he appears to have consulted upon the subject of his will. He advised him to have it written in the Guzerattee language and he would translate it into Persian, and the will was afterwards brought to him in the Guzerattee language, and he was asked to put his seal to it. This he declined to do, because it was in his own language, and he did not think fit to sign it in the Guzerattee language. He does not say whether there was any witness to it. So that there is only one witness who speaks to there being any witness to it, except the witnesses themselves who attest it. Then we have no account of the man who was employed to write the will, and we have no other account, except what I am about to state, of the handwriting of the testator himself. You have no account of the person consulted and who drew it up. It appears that the testator thought it necessary to come and consult Mooftoe Gholam Ali about the will, and therefore he did not consider himself competent to make it himself, and there is no person who says it was an autograph in his own handwriting.

Then Ardaseer says that the signature appears to be in the handwriting of the testator. That is all that he says, and nothing further is asked upon that subject. With respect to the will itself, he says Homabae told him, four or five days after Dosabhaee's death, that there was a will. He did not see it then: it was within two months after the death of the testator he saw the will, with two witnesses to it.

Now, whatever may be the value of this witness's character or credit, his testimony amounts, after all, to nothing more than this: that, a short time after the death of the testator, Homabae told him there was such a will, which neither he nor she made any mention of at the time the tunderooste was read, and at the interval of a month or six weeks she shewed him the will with two witnesses to it. When it was made, or whether it was in existence at the time when the tunderooste was read, or whether she mentioned it to him, we have no evidence: all we have is that he says there were two witnesses to it. It is to be observed that here is a stamp; and those precautions might very possibly have been observed if the will was in contemplation, in order to induce the testator to make a will. He was very near his death, and it was not at all impossible that this woman might have had the intention of applying it to the purpose of a will; but we have no evidence that the testator ever interfered about this stamped paper.

This is the evidence in favor of the will; now, what is the evidence against it? The evidence against it is, independently of the circumstance of it not being notified at the reading of the tunderooste and there being no writing corresponding with it, acknowledging by Punjeabhaee that he was Dhurm-putr, independent of those circumstances, and its not being witnessed by any of the relations or of the caste, which possibly might arise from the circumstance of the testator being about to dispose of his property in a manner that his caste might disapprove of; still we find that that which is usual was not done upon this occasion. Then, independent of all that, we have the testimony of four, if not five, witnesses, who positively state that they saw this will after the death of the testator, and that at that time it had no witnesses to it; that they were applied to by the widow or by the brother to sign it, and that they refused, and that at that time there were no witnesses to it.

Now, the persons who state that are Dunjeabhaee Saporjee and Dunsha Eduljee, who, be it observed, is a Parsee, and whatever credit is due to a person on

that account is due to him. Hurgovindas Huggerwands, who was applied to do it and refused, and Eduljee Rutunjee, a Parsee also, those four refuse to sign. They were asked after the testator's death, and they all say there was no witness to it at that time. Then we have this important fact besides, from the evidence of Eduljee, that Homabae was the person who applied to him, and that she told him that Abdoola would witness it. Now, if that account is true, it is indeed not wholly unimportant, as contradicting the testimony of Abdoola, who stated he signed it before, and if so, the testimony of the second witness cannot be true. These witnesses are opposed to one another in the testimony they gave; but the evidence seems to warrant the conclusion that the majority of the Sudder Dewanny came to, namely, that this will was not satisfactorily established.

Then there is one other witness besides Peshtunjee Kalabhaee, who speaks not only of the declaration of Homabae that Abdoola would witness it, but he positively says that Abdoola said he had signed it after the testator's death. "Abdoola said to Dadabhaee, 'You and Peshtunjee are now endeavouring to settle the dispute between Punjabhaee and Homabae: the sooner you settle it the better; because after Dosabhaee's death, I attested Homabae's will at her own request, and also at the desire of a respectable person.'" Who that respectable person was he does not mention. Here are three witnesses upon this part of the subject in contradiction of Abdoola, and, as I said before, if these witnesses are credited, it gets rid of the will.

Under all these circumstances, the majority of the Sudder Court were of opinion that the will was not proved. It is a question to be judged of in a great degree by a comparison of the evidence; but we may look at the circumstances of the case, and what are they? In whose favor is the adoption? The adoption is made in favor of one of his nephews who had married his own daughter; therefore it was not at all unnatural, if a selection was made, that that selection should be made in favour of the husband of his daughter. The other party who claims it upon this occasion is his second wife, and she is entitled to a provision out of the estate by the Parsee law as well as the Hindoo law. She will not be left destitute by this will not being established. She is entitled to a provision, and therefore the disposition is not an unnatural one, not an improbable one, not an unkind one, and not one that you can think at all unlikely to be made.

There is only one other observation with respect to Ardaseer, whose evidence has been so much relied upon. I have already observed that the evidence he gives himself does not amount to much; but the situation in which he stands, if compared with the testimony of other witnesses, does not appear to their Lordships to place him in a very favorable situation. He is a party to the cause, and may have had a very considerable interest in supporting the suit of Homabae. Whether he had or not is not clear; but at the same time, the case is one of very considerable doubt and suspicion. It appears that the brother Ferozshah, at the time when the tunderooste was read, agreed to advance a sum of money to Punjabhaee, to enable him to pay the funeral expenses, which it appears from the evidence that Homabae had desired him to do, saying she had got some of the testator's money in her house, but that he must borrow money and send it to her, and she would take care to pay the expenses and give him an account of it. Accordingly Ferozshah does advance the money and takes a note from him in the terms of which it appears, and he signs it, as is observed by the learned Counsel at the Bar, in the name of the person who was adopted, and with the name of Dosabhaee in addition to his own. Then it appears that, after this suit had commenced, the signatures were torn off of that note, and that note is returned to Punjabhaee. For what purpose that note was returned, whether in order to prevent it having any effect against his claim, or whether it was for any other purpose, it is difficult for us to undertake to say. However, it was a fact the note was returned. It is very

material to attend to what his conduct was, and the manner in which he states his claim at the time of the arbitration. When he puts in his petition, he says, "We, as heirs, have a right to share in the inheritance. Darashah and Dosabhac's wife have combined together and filed a suit for 25,000 rupees in the name of Punjeabhac, the son of Darashah, for the purpose of getting possession of Dosabhac's estate, and they have set forth that Punjeabhac is the adopted son of Dosabhac, and the parties have, with their own free will and consent, referred the case to arbitration; and we thought that Darashah would not get any more but his share of the estate, but we have just heard that plaintiff and the arbitrators for both parties have combined together, and wish to give the whole of Dosabhac's estate to Punjeabhac, and intend to deprive us of our share; on that account it is necessary for us to file a suit for our share, which we will do to-morrow." Now, it is certainly extraordinary, if this man at this time was conscious there was a will that was executed in favour of Homabac, giving her the whole of the inheritance, and he had seen it, that he should hold this line of conduct. He opposed, however, there, and then he proceeds upon an appeal in the Sudder Dewanny; and it is rather material to turn to his testimony, upon which some judgment may be formed, whether or not he stands so clear entirely of all the circumstances relating to the commencement of the suit, as to place him entirely above all suspicion, and to entitle his testimony to countervail the testimony of all the other persons of his own caste who have given evidence upon this occasion. In page 42 there is this passage: This evidence was taken the 10th of July 1824, two years after the time when he had filed the petition, in which he complained that Homabac and Punjeabhac were combining together. The question is, "If Punjeabhac Dosabhac was not the heir of the deceased, how came the note of hand for the money advanced to Ferozshah to be taken in his name?" "What do I know about it? My brother gave the money, and can answer that question." It is rather an extraordinary answer. "Did Homabac always come to you and Ferozshah to ask your advice regarding this suit?" "No; but once or twice she might have come to talk about the decision of the suit." This is a man complaining of Homabac and Punjeabhac, and their colluding together. "Did Ferozshah, Homabac, and yourself, appoint any respectable person to divide Dosabhac's estate?" "No one was ever called by me; but, either by the wish of plaintiff or some one else, some one was sent for." That relates to something else. "What was written down for Homabac's maintenance in the rough copies which were written regarding the decision of the suit?" "After the investigation agreeably to the custom of our family, it was fixed that Dosabhac's property should be divided into three shares: one share was to be given to Homabac, the second to Darashah, and the third to my brother and myself. Punjeabhac was to get one house and garden situated on the banks of the river, which fell to Dosabhac's share, above what he was entitled to. Moteebhac was to be given whatever was mentioned in the decree of the Court. Four or five months' allowances were due, which have been deducted from the property, which arrangement Darashah agreed to; but Homabac, owing to the will, would not agree to it." Now, it appears, I think, from these passages, that this person Ardaseer was so mixed up in the suit that we cannot say he was a person who can be supposed to have no feeling upon the subject, and at least he is not entitled to be placed in that high position that entitles him to give evidence to put down the testimony of all the other witnesses.

From all these circumstances, their Lordships are of opinion that the adoption in this case has been proved, and that the will has not been established; the consequence is that the decree of the Sudder Dewanny Adawlut must be confirmed without costs.

Judgment below affirmed without costs.

The 7th April 1835.

Hindoo Law of Adoption—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Sutroogun Sutputty

versus

Sabitra Dye.

According to Hindoo Law, neither registration of the act of adoption, nor any written evidence of that act having been completed, is essential to its validity.

In no case should the rights of wives and daughters be transferred to strangers or to more remote relations unless the fact of adoption by which this transfer is effected be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.

Although the Hindoo Law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of life of a zemindar adopt sons, to acknowledge such adoption in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such an adoption.

Lord Wynford.—In this case it is not necessary that I should trouble your Lordships at any length; but these Indian names not being very familiar to me, and as it is very probable, from that circumstance, that I should confound different persons, I have thought it right to put the few observations I feel it my duty to make, into writing.

My Lords: The Law of Adoption owes its origin to the timorous superstition of the inhabitants of India. These people, vainly imagining that, by leaving male children in this world, they secure themselves against the torments of the next, seem to have been so anxious to obtain natural or adopted sons, that they have established but imperfect securities against fabricated adoptions.

The law of three children conferred advantages on Roman citizens, which induced them to adopt sons, and when they had got the honors or offices which they desired, they often turned the adopted children loose on the world again. Tacitus *Annalium*, lib. 15, c. 19) says: “*Percrebuerat eâ tempestate pravissimus mos, quum propinquis comitiis aut sorte provinciarum, plerique orbi fictis adoptionibus adsciscerent filios.*”

The Romans and other nations which incorporated the civil with their municipal laws, have wisely provided against such frauds. By the Civil Law, the sanction of the Magistrates was essential to the validity of the adoption of an infant; these Magistrates regarding the circumstances of the person proposing to adopt, and those of the child that he was desirous of adopting, being authorized to decide whether the adoption would be to the advantage of the latter. (*Digest*, book 1st, title 7, C 2, c 17.)

By the Code de Napoleon, adoptions must be registered in the Court of first instance, and in the Imperial Court; and in the latter an opportunity is afforded to the relations of the person proposing to adopt a child, of shewing that the adoption proposed ought not to be allowed, this Court having authority either to confirm or to annul any adoption.

In our own country, although wills are revokable, we do not allow the favored title of heir to be set aside but by a will in writing, attested in the presence of three witnesses; but according to the Hindoo Law, neither registration of the act of adoption, nor any written evidence of that act, having been completed, is essential to its validity. It is to be lamented that an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would contribute much to the security of property and the happiness of Hindoo families, if, in a country where the religious obligation of an oath is unfortunately so little felt, and documents so readily fabricated, adoptions and all other important acts were required to be performed in the presence of some Magistrate, and to be recorded in some Court. But although neither written

acknowledgments, nor the performance of any religious ceremonies, are essential to the validity of adoption, such acknowledgments are usually given, such ceremonies observed, and notices given of the time when adoptions are to take place, in all families of distinction, such as those of zemindars or opulent Brahmins. Wherever those have been admitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say that, in no case, the rights of wives and daughters should be transferred to strangers or to more remote relations, unless the act of adoption, by which this transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.

At the beginning of this case a striking improbability occurs, and which the appellant has endeavoured to account for by a circumstance that is attempted to be proved by insufficient and contradictory evidence. Dhunjee Sutputty was, according to one account, twenty-two, and according to another, thirty-six years old, when he adopted Sitroogun; his wife was eighteen. She had given promise of having children, for she had borne a daughter and another child that had died. Superstition was not likely to frighten a person so circumstanced into the doing an act by which his daughter would be disinherited, and the inheritance of any son or sons that he might have be divided with a stranger.

The Roman and French laws are wise in this respect: they do not permit persons under fifty years of age to adopt. (Hienecius, L. 1, tit. 11, sec. 177.—Code Napoleon lib. 1, tit. 8, sec. 1.)

To get over the improbability of so young a man adopting a son, we are told a story of his having his nativity cast by a Brahmin from the north, who assured him that no male child of his would live. One should have expected that that Brahmin should have been produced as a witness, or some reason given by evidence for not having him before the Court. Two persons have been called as witnesses, who stated that they attended Dhunjee Sutputty upon this occasion, when he went to this Brahmin. One of them knew the Brahmin's name and where he resided: he could have assisted in enquiring after him, and bringing him, or accounting for his absence. He lived but four days' journey from Dhunjee Sutputty. Those witnesses contradict each other. Deby Bhady, the family priest, says that the nativity was cast about the seventh or eighth hour of the day, in the presence of Lukhun Bhady, Subram Sarbtroom, Narain Sidhant, and himself. Juggernath Chuckerbutty saith, that the calculation was made about three hours after sunrise in the presence of himself and Luckiputty. They differ as to the time of casting the nativity, and as to every one persons supposed to be present at the time it was done.

The passage in the defendant's Answer in page 5, is not explained to my satisfaction. He says, "When first my father made over his property to me." He would not, in a pleading, have used those words with reference to an act of adoption. Again, "All the papers relative to the talooks which during my father's life were in the hands of Luckichurn Sutputty." These words cannot mean papers relative to the adoption, for the main defect of *his* case is that there are no such papers.

The evidence as to the signing of the petition of the respondent is contradictory. Two witnesses swear that she did not sign it; three, that she did: but it does not appear that any of these witnesses saw more of her than her hands. But, consider the improbability of her voluntarily signing a petition destructive of her own rights, and will not the balance of evidence incline against the genuineness of this paper? One of the learned Counsel admits that, if that be a false and fabricated instrument, little credit can be given to any part of the appellant's case. I think that, if any important paper produced by the appellant as a genuine paper be shewn to be false, the Court cannot have any safe ground for deciding in favor of one who knowingly has produced such a fabricated paper as a genuine instrument.

Sutroogun produced to the Court a letter purporting to have been written by a zemindar, as an answer to an invitation sent to that zemindar to attend the religious ceremonies thought proper to be observed for the sanctioning that adoption, and which letter appears to have been written before these supposed ceremonies were performed, although he had himself fabricated that letter, and obtained the zemindar's signature to it many years after the time when it purports to have been written. Is not this forgery equally as destructive of the appellant's case as that of the respondent's petition?

But it cannot be doubted that the respondent was kept in a state of *duress* for the purpose of preventing her from asserting her rights. The darogah's answer to the Magistrate's order is evasive. He wishes to satisfy the Magistrate that he had not been confined. He first reports the answer given to him by Luckichurn, which answer is to a question, "How can peons be placed on the inside of the house by the women's apartment?" He makes Sabitra say she had not been watched by peons; but she adds, "the day after my brother brought a man from the Magistrate's, there were two peons near my door." The appellant, therefore, appears to me to have attempted to prevent the respondent from bringing her case before the Court by *duress*, and to support his own by false witnesses and fabricated instruments.

I will not fatigue the Court by calling their attention to the numerous contradictions that are to be found in the evidence. I will only add that, although the Hindoo Law does not require that adoptions should be acknowledged in writing, it is usual, when persons in the situation of life of Dhunjee Sutputty adopt sons, to acknowledge such adoptions in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such adoptions. It is admitted that there was in this case no acknowledgment in writing, and that no zemindars attended, or were invited to attend, the ceremony of adoption. The zemindars, it is said, were asked to attend the performance of the religious ceremonies; but the time when it is most important for the prevention of fraud that those persons should attend, is that of the adoption, for what is then done cannot be undone by anything done or omitted afterwards. I think I have stated (but I am much obliged to one of the learned Judges for the suggestion if I have not), that there was no communication of the adoption to the ruling authorities, which is a more important circumstance than the noticing it to the zemindars or any other person.

Their Lordships are of opinion that this appeal should be dismissed with costs; and I hope that, if religion has not sufficient moral influence on the minds of Hindoos to prevent them from supporting their claims by perjury and forgery, self-interest will; and when they learn that the calling perjured witnesses, or producing forged instruments, will be visited with costs, I hope we shall have less reason to complain of parties attempting to avail themselves of those wicked means of supporting or defending causes.

Appeal dismissed with costs.

The 21st May 1835.

Sale (bona fide though not strictly of a complete and final character).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Lalla Chooneelal Nagindas,

versus

Sawaechund Namedas.

A deed of sale, though not strictly of a complete and final character, yet if genuine and duly attested, may be sufficient to bind the property and to give the purchaser the right to demand a specific performance of the contract and the execution of such further assurances as might be deemed necessary to invest him with a complete title to the property. Such a deed would necessarily prevail over any intermediate attachment of the property for debts due from the original proprietor.

Vaughan, J.—THE Lords of the Council are unanimously of opinion in this case that the judgment of the Sudder Adawlut should be reversed and the judgment of the Zillah Court affirmed.

It appears that the respondent, being a creditor of Selool Moleswar for 2,785 rupees, on the 29th March 1819 obtained an order from the Zillah Court of Kaira, in the nature of an attachment upon three houses situate in Oomrut, the subject of the present appeal; that, on the 4th of May 1820, he obtained a further order from the same Court, authorizing the sale of those houses for the purpose of satisfying that debt. The usual notice was given, requiring all persons who had any claims upon this property to appear and establish them. More than a year elapsed after the order for the attachment issued, before any step was taken or claim made by the appellant, who, on the 17th of May 1820, presented a petition to the Zillah Court, praying that the sale of the houses might be stayed, and thereupon filed his plaint in the same Court, insisting upon *his claim* to the property in question, as having been the *bonâ fide* purchaser of it from Selool Moleswar, under a deed of sale executed by him to the appellant, on the 31st March 1819; that the consideration for the purchase was a debt of 5,801 rupees due from Selool Moleswar to the appellant and 200 rupees paid in cash, making together the amount of 6,001 rupees, the then fairly estimated value of the three houses; that, being a travelling Maharajah and not an inhabitant of Oomrut, he was ignorant of the respondent's proceedings until long after the attachment had issued. Upon his plaint being instituted in the Zillah Court, the respondent denied the validity of this deed of sale, insisting that it was not a genuine but a false and fabricated document, and that no witnesses attested the execution of it. The case appears to have undergone a very full and careful investigation in the Zillah Court, where four witnesses were examined upon oath, who, in the judgment of that Court, satisfactorily established the due execution of the deed.

From this decree of the Zillah Court the respondent appealed, and on the 6th January 1823, the appeal was heard before the Third Judge of the Sudder Adawlut, when no further evidence was adduced; but that Judge not being satisfied, upon the inspection of the instrument, that it was written at the time therein set forth, and because the appellant claimed under a deed, whereas he produced only an agreement, thought there was sufficient reason for submitting the appeal to the Full Court. The case was accordingly submitted to a Full Court on the 30th January 1823, when, without examining any witnesses, the Sudder Adawlut reversed the decree of the Zillah Court with costs, being of opinion that the deed in question was not so complete a document as to warrant their interference with the attachment, not having all the requisites of a sale.

Upon a review of all the proceedings and of the evidence adduced in the different stages of the suit, from its commencement in the Zillah Court until the hearing of the present appeal, it appears that the respondent relied upon the invalidity of the instrument of sale, contending that it was not a genuine but a fabricated document; that it was not executed when it purported to bear date, and that it had no attesting witnesses at the time of its execution; that it was not an absolute and final deed of sale, being only a *satakut* or preparatory instrument in the nature of articles of agreement, intended to be followed by the execution of a more formal conveyance, and therefore was in itself of no validity to pass any interest in the property which was the subject matter of the appeal.

The Lords of the Council are unanimously of opinion, that there is no solid foundation for any of these objections. And first, with regard to the objection, that it was not a genuine instrument. In the Zillah Court four several witnesses were examined, all concurring in their attestation of the fact, that the instrument was executed by Selool Moleswar *at Baroda at the time when it purports to bear date*, and under the circumstances stated in their respective depositions; and when the respondent was invited and challenged to contradict or impeach their testimony, and indulged with time abundantly sufficient for the purpose, he never pro-

duced even a single witness of any description in the Zillah Court to repel the appellant's claim. The opportunity of doing so was a *second time* offered to him when the appeal was heard by the Third Judge of the Sudder Adawlut, and *again* when the decree of the Zillah Court was reversed by the Sudder Adawlut after a hearing before the Full Court.

The Lords of the Council are therefore of opinion that the facts and circumstances, as they regard the due execution of the deed, are conclusive in favor of the appellant.

As to the objection to the validity of the deed (assuming it to be genuine, and attested in the manner deposed to by the four several witnesses in the Zillah Court) founded upon the fact of its not being a complete and final deed of sale, inasmuch as the parties contemplated the execution of a more formal conveyance, the Lords of the Council are unanimously of opinion that it was sufficient to bind the property, and to give to the appellant the right to demand a specific performance of the contract, and the execution of such further assurances as might be deemed necessary to invest him with a complete legal title to the houses which were the subject matter of this appeal.

Under these circumstances, the Lords of the Council are of opinion that the sentence of the Sudder Adawlut ought to be reversed and the original sentence of the Zillah Court affirmed without costs.

The judgment of the Sudder Adawlut reversed without costs.

The 22nd May 1835.

General Release.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Malick Bapoo Meyan,

versus

Hari-Walub Nagurdas.

Case dismissed, because the Privy Council upon the evidence considered that the general release set up by the defendants could never have been contemplated by the parties to operate as a release of all demands.

The Vice-Chancellor.—THEIR Lordships in this case have the concurrent judgments of two Courts below, who were much better able to appreciate the testimony of the witnesses than we are. The evidence of Mooteebhaee, certainly, in the clearest manner shews an account to have been settled in the Sumvit year 1866. He had an interest in the result of the suit, and he takes upon himself to say that the transaction in regard to the jewels took place in respect of the settlement of this very account, and that they were given in part payment of the balance; but these jewels are mentioned in the bond, and the bond was passed in 1863, and according to his statement the ornaments were given two years afterwards. The balance itself was not, however, settled till 1866, and so far from it being true that the ornaments were given two years after the bond, that it appears upon looking at that document, which is dated 1863, that it states the fact that, "as security the following gold ornaments are lodged with you;" after which follows a special description of them; so that the documentary evidence, which cannot be falsified, is quite at variance with that portion of Mooteebhaee's evidence. It is evident, according to the way in which he represents the case, that even were it true that no direct authority was given to him in the first instance by Futteh Mahomed to settle the balance, yet that the balance, when settled, was recognized by him.

The defendants below in the original action wished to have it represented that there was a general release, and a document is produced, which was executed in the Sumvit year 1874. Now, it is remarkable that they themselves, speaking of what appears upon the face of the bond as it is called in their answer to the original plaint, say, "The rupees 50, entered as having been paid, may have been due to him and paid; we owe him nothing more. In proof of this, we had a claim on

"Goverdhun Asharam, in part of which he deducted rupees 50, and for the remainder he passed a bond; and if Goverdhun's claim was on us, why did he pass the bond?" Now, that can refer only to this instrument of 1874, which is set out in page 21 of the Appendix, and which appears to be anything but what is represented by the defendants in their own answer. With respect to the fifty rupees it says, "fifty rupees for the Fusal, of Sumvit 1874, are credited in part of my demand." The representation is, we had a claim upon him in payment of which he deducted 50 rupees, whereas, in the instrument, it appears that he had a large demand, in part payment of which he had credited 50 rupees. I make that observation to shew that the defence must not only be false to a great extent, but false to the defendant's own knowledge.

This instrument, upon the face of it, appears to relate to some transactions as to the villages, and to represent the mode in which the rent should be paid. Then there being these 50 rupees "credited in part of my demand," it is said that the words, "besides this there is nothing else," which are written below the end of the instrument and not in any part of the body of the instrument where the transaction between the parties is contained, clearly shew a final settlement. It would appear most extraordinary that, where there was a foundation, at least, for a claim of nearly 4,000 rupees, in part payment of which 50 rupees had been given, the creditor should, without anything like a consideration or any equivalent, voluntarily execute a release of the whole. If it was a release, as they contend, it must discharge not only the balance but the sum due in respect of the transaction upon which the jewels were pledged; and if so, how did it happen that the jewels were not in the possession of the defendants but in the possession of Goverdhun Asharam? It appears to us that all these circumstances shew that that instrument never could have been taken as a release generally of all demands; and what one of the witnesses says is scarcely credible. Umrut Lal Kandas says, "In the month of Sravana (October) of the year 1874 I went to Dholka, to Shree Putraee, and Goverdhun Asharam had taken the village Ranaysin on lease, and Bapoo Meyan has an hereditary claim of custom (gras) upon the village of Ranaysin. Goverdhun said, 'I demand 8,000 rupees; instead of that money shall I collect the Ranaysin (duty) custom.' Shree Putraee replied, 'The custom shall not be received by you in lieu of that demand.' Then Shree Putraee settled that, on that demand, instead of 50 rupees he should receive 118 maunds of grain annually." Now, this statement may be true, so far as it goes to represent some conversation, in which there may have been a representation that 8,000 rupees were due; but it is utterly absurd upon the face of it, as representing the real state of the transaction, because, if there was a demand of 8,000 rupees, it is not in the least probable the parties should agree that, instead of there being 50 rupees paid, he should receive 180 maunds of grain. Other witnesses have also been examined, whose evidence goes to shew that the origin of this instrument of 1874 was in respect to the village Ranaysin; but there is nothing to satisfy those who read the evidence that it could have been in the contemplation of the parties that it should operate as a release of all demands. It seems a very unfair defence to be set up by the parties, and therefore the appeal must be dismissed with costs.

The 4th December 1835.

**Hindoo Law of Succession—Adopted son of Daughter having brothers alive—
Appointed daughter—Bought son.**

On Appeal from the Sudder Dewanny Adawlut of Madras.

Yachereddy Chinna Bassavapa and others,

versus

Yachereddy Gowdapa.

According to Hindoo Law, a person cannot succeed as the adopted son of a daughter who has brothers alive, and who cannot be an appointed daughter, if she had brothers when she married. Nor can he succeed as claiming under a bought son.

Mr. Baron Parker.—THIS case, which was argued before us on Friday and Saturday last with much care and ability, is involved in more than an ordinary degree of perplexity, from the want of clearness and precision in the pleadings, and distinctness in the evidence adduced by the parties. We have given the case all the consideration in our power, and upon the whole we do not see sufficient reason to reverse the decision of the Sudder Dewanny Adawlut, by which the decree of the Provincial Court was reversed.

The suit was instituted in the Provincial Court for the Centre Division on the 18th of August 1817 by Bassavalingapa, to recover one-third share in certain shops at Wallajapetty, alleged to have been formerly the property of Gowdapa, of which shops the defendant, Chinnapa Gowdapa, and Roodrapa, had possessed themselves, and the plaintiff rested his claim on the ground that Moodapa, the adopted son of the common ancestor, Bassavalingapa, his natural son, and Tircapa, his bought son, who married his two daughters in succession, and was made joint heir to the estate, were on his death entitled to all the property of the deceased in three equal shares; Chinnapa, the first defendant, having a right to one-third as representative of Moodapa; Gowdapa, the second defendant, to another, as adopted son of Solavapa, the adopted son of Bassavalingapa; and the third belonging to the plaintiff himself, as the adopted son of Tircapa. The other defendant, Roodrapa, was included not as a party interested, but simply as being in possession of the subject-matter of the suit.

The plaint states that all the rest of the property had, some years after the death of the ancestor and about the year 1801-2, been actually divided, and one share given to the plaintiff's mother, Chinnamal, and that the property in dispute was agreed between her and Chinnapa and others to be divided, by an instrument of agreement (or farigh-kutti) of the 11th February 1805; that the mother preferred a complaint to Mr. Bruce, the Collector of Bellary, in 1806, and that, in consequence of his interference, Chinnapa, the first defendant, wrote a letter of the date of the 9th of August 1806, to the agent in possession of the shop in question, desiring him to divide the property in it. To this plaint Chinnapa, the first defendant, put in no answer. Gowdapa, the second defendant, claimed the whole property as the sole representative of the deceased Gowdapa, and denied the title of Chinnapa and also of Tircapa, under whom the plaintiff claimed. He also denied that he ever divided any part of the patrimonial estate, or agreed to divide that in dispute, and accounted for the interference of Chinnamal and Chinnapa with the property, by imputing to them a conspiracy to defraud him and the widow, Bassavalingamal, who adopted him.

Other subsequent pleadings took place, but in none is the lapse of time since the supposed cause of action accrued insisted upon as a bar. The plaintiff died a few days after the institution of the suit, and his right devolved on the present appellant, who continued the proceedings until their termination. After much evidence had been given on both sides, the Provincial Court pronounced its decree in favor of the plaintiff, whose title to one-third they state to be derived from Chinnamal, the second wife of Tircapa, "to whom the original proprietor gave that third;" and they add that the undivided property in all the estate was afterwards divided, except in the shop in question, in which the property was still united, and they decided that the plaintiff was entitled to one-third of it. From this decree there was an appeal to the Sudder Dewanny Adawlut, which reversed it, on the ground that the cause of action had arisen more than twelve years before the suit commenced, which was therefore barred by the Madras Regulation II. 1802, Clause 4; and the Court intimates that, if this were not so, the plaintiff had no title, because Chinnamal, under whom he claimed, could have no share of the inheritance, as, at the time of the common ancestor's decease, there was an adopted son and son of the body living. This appeal comes before His Majesty in Council from the decree of the latter Court, and the question to be now decided is, whether that decree was wrong.

It is contended, on the part of the appellant that it was so; because, first, the objection as to the lapse of time was not taken on the pleadings, and was not

available to the defendant below, unless so taken; and, secondly, because the action was really brought in time, and the right of the appellant was established by evidence.

An endeavour was made to support the first objection by analogy to the Statute of Limitations, which, it is now fully settled, must be pleaded by a defendant in our Courts, if he means to take advantage of it. But the language of this Regulation is much stronger than that of the Statute of 21st James I., and it prohibits the Courts of Adawlut from trying the merits of any suit, if the cause of action shall have arisen twelve years before, unless the complainant can shew, by clear and positive proof, that there had been an admission of the truth of the demand, or an application to a competent authority, within that period, and shall assign satisfactory reasons to the Court for not having sooner proceeded. And, adverting to this positive language affecting the jurisdiction itself, we think it would be incumbent on a plaintiff, in pleadings conducted with any degree of regularity, to shew, by proper allegations in his plaint, either that the cause of action did accrue within twelve years, or to bring himself within the other alternative stated in the Regulation; and it seems to us that it would be the duty of the Court to give judgment against him, when the cause came to a hearing, for defect of such allegations, unless that defect were supplied by the allegations in the pleadings of the opposite party.

But if the appellant had really established his claim in the manner contended for on the argument (that is, if he had shewn that there was an agreement made between competent parties, either in the lifetime of the common ancestor, or after his death, by which he obtained a right to a third of all the property belonging to that ancestor, both that which was actually divided, and that which was the subject of the suit, and which was to be actually divided when the complainant required it), it is by no means clear that this claim would have been barred by lapse of time; for the cause of action may not be considered as having accrued until it was clear that a refusal had taken place on the part of the person entitled, or of the person in actual possession, to deliver up that third share; and there seems to be little doubt that such refusal did not occur until after the 13th of September 1805, when Chinnapa wrote the letter to Chinnamal of that date, acquiescing in her right to the third part in question.

It is, however, unnecessary to decide this point, because we are of opinion, on an attentive consideration of the material allegations and evidence, that the appellant has not made out such a case of title.

It is very clear that the plaintiff below could not recover against the defendants, whom he admits to be in possession of the subject matter of the suit, without proving his own title, however defective that of the defendants or some of them might be. It is equally clear that, by the Hindoo law regulating the right of succession to the property of a deceased ancestor, the appellant, even supposing his father's adoption by Chinnamal to have been valid, had no right whatever to succeed to any part of the estate. He had not as claiming from Chinnamal, because Chinnamal being a daughter could have no share, as there were brothers living, one adopted and one born at the time of her father's death. She could not be an appointed daughter, for she had brothers when she was married (A). Again, the plaintiff could have no right as claiming from Tircapa, for Tircapa was a bought, not an adopted, son, and as a bought son (B) he could not succeed; and adopted he could not be (a), because Gowdapa had already another adopted son as well as a son born, and the fact of Tircapa's marrying a daughter excludes the possibility of his being a son, for such marriage would have been incestuous.

(A) Menu, cap. IX., v. 127; Daya Bhaga, cap. X., s.s. 2 and 4.

(B) See the arguments and opinions on this subject, 2, Strange's Hindoo Law, pp. 132 to 193.

(a) See the opinion of Mr. Suthe rland, 2, Strange's Hindoo Law, p. 86, and Strange's Hindoo Law, p. 78.

In no way, therefore, was it possible that the plaintiff could have any title by succession by the general Hindoo law ; and it does not appear by any averment in the pleadings, or any reference to Pundits, that there is any modification of the general law in this particular district. Accordingly, the plaintiff's right was put in the argument on the ground of some family arrangement, some contract between its members, either in the life or after the death of the ancestor, by which one or more of the other members of the family having the right to the property communicated to Tircapa, or some one under whom the plaintiff claims, a title which he did not before possess. Such an arrangement may have been made, and if proved, would have been supported ; and a case from India (b), in which a compromise was made by a deed, and an estate divided between persons having right and others having colour of right, has already been before their Lordships, in which the decree of the Court below was in favor of the deed, though it appeared probable that the party taking a benefit really had no title. But in the present case there is no sufficient proof of any such agreement.

In the plaint the foundation of the plaintiff's title is stated to be that Tircapa was made joint heir when he was bought and given in marriage (Appendix pp. 4 and 14). But assuming that it was competent for the ancestor to have so dealt with the property and given a share to the husband of his daughter, with or without the consent of the co-heirs, let us see on what the proof of such disposition rests. That Tircapa was treated as one of the family by strangers, appears from two letters addressed to him by the family name ; but that he was made a co-heir and had a share given to him, rests upon mere hearsay. Moodapa (p. 28) says that he understood so, but he never saw Tircapa ; and Nagapa, another witness brought to prove that fact, and who says that Tircapa was twice made heir to Gowdapa (p. 31), admits, on cross-examination, that he derived his information from Moodapa and others (under none of whom does the defendant claim, and therefore their statements are not evidence), that fifty years ago Gowdapa promised Tircapa to give him his daughter in marriage, and to consider him as a son and to make him heir, and that he was brought to the house with the consent of Gowdapa's adopted son, but that the witness was not present. The evidence of another Nagapa is hearsay only. The fact, therefore, of a gift by the common ancestor to Tircapa is not proved by satisfactory evidence, even if such evidence be legally admissible in the Native Courts. There is no doubt, indeed, that, after the death of the ancestor (it would seem many years afterwards), a division of some part of the estate in the Nizam's country did take place between Chinnapa and Chinnamal, and by the account of one witness only, Bassavalingamal, the defendant Gowdapa's mother, had one share. This may have been because Chinnamal was entitled by a disposition made by Gowdapa, and would be strong confirmation of that fact if it had been proved *aliunde* by some legal evidence, yet the only legitimate inference to be derived from that decision alone is that the parties who took shares were entitled in some way to those shares in those specific effects, but no more ; and the documents, as far as they relate to the proof of title, are no evidence, except against Chinnapa himself. As admissions, they do not bind or affect the interests of the defendant Gowdapa, for whom he is not shewn to be agent ; and Chinnapa himself could give no title, for, having been adopted when married, his adoption was void, therefore he had no title by succession, and there was no proof of any other.

The probability is that these acts were an encroachment on the rights of Bassavalingamal and the defendant, she being a widow and he an infant, whether adopted or not at the time.

Upon the whole, therefore, as the plaintiff was certainly not entitled to a share by the general Hindoo law as of common right, and as no modification of that law in that particular district has been shewn to us in this case, he cannot recover the

(b) Rajunderain Rái vs. Govind Sing Beng.

share in question, unless he can clearly prove that he had a title by gift or conveyance; and the evidence is too loose and unsatisfactory to convince any one that such a gift or conveyance was made. We therefore think that the judgment of the Sudder Dewanny Adawlut must be affirmed; except so far as it gives to the appellant below (the now respondent) the costs in both Courts. We think that, under the special circumstances of this case, such costs ought not to have been given, and each party ought to pay his own costs, both of the suit in the Court below and in the Sudder Adawlut, and we affirm the decree so far as it is affirmed without costs.

The 26th November 1836.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet,
T. Erskine, and Sir A. Johnston.

Onus probandi—Razeenamah—Fraud—Duress—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Motee Lall Opudhiya.

versus

Juggurnath Gurg.

* Where an appellant alleges that a Razeenamah was obtained from him by duress or fraud, the *onus* is on him to prove his allegation. Mere possibility or probability that there may have been such an origin of the transaction, is not sufficient to entitle a Court to set aside the Razeenamah.

Where also an appellant complains that he had not an opportunity of giving his evidence to the Court below, it is for him to show that he had tendered evidence which the Court had rejected.

Lord Brougham.—We shall not trouble the respondent upon this case. We are of opinion, in the first place, that the *onus* of proof lies clearly upon the appellant; the affirmative of the question, was or not this razeenamah obtained by duress? Fraud also is mixed up in this question of duress, but it is principally a question of duress, whether or not there was a conspiracy by these persons to obtain from him this release, and we are of opinion (as indeed there is no occasion to argue that appoint) that the *onus* lies upon the appellant to satisfy the Court here, as it lay upon him to satisfy the Court below, that there was such duress or fraud through which the razeenamah was obtained. It was not sufficient to say that there is a case of doubt; that it is not perfectly clear that the man is a free agent; that there may be suspicions on the conduct of the other party; that there is a possibility, and that there may be ground for the conclusion that it was not his own act. That is not sufficient. Mere possibility, or even, to go further, probability, that there may have been such an origin of the transaction, is not sufficient to entitle the Court to set aside this razeenamah. Now we are of opinion that the evidence is not enough, that there is not sufficient to satisfy us and ought not to have satisfied the Court below, and, consequently, we think that the right conclusion has been come to.

The other point that has been taken is, that the question before the Court below, and brought by appeal before us, is, whether or not there was ground for further enquiry, and that the Court below did not give an opportunity to the parties to adduce all the evidence that they were in possession of? Here, again, we are of opinion that the proof lies upon the appellant, and that he complaining that he had not an opportunity of giving his evidence to the Court below, it is for him to shew from these proceedings, that he was ready to produce evidence and offered that evidence, and that the Court rejected it. Now we are of opinion that he has not made out that, that he has not proved that he made that tender, and that the Court rejected it. On the contrary, taking the statement which we have

of what took place below, principally from that on which both parties most rely, as well as upon the more formal and distinct account of those proceedings (namely, the statement of the third Judge's judgment), it rather appears that a certain mode of enquiry was pointed out, that a certain mode of taking the evidence was suggested, and that there was, I will not say, acquiescence of the parties in that, for it is not necessary in that case, but that there was no objection by the parties, and that there was no evidence tendered by them which the Court refused to hear. Consequently we are of opinion that upon that ground also the appellant has failed; that he has not satisfied us that he tendered evidence which was rejected; and that upon the whole, the trial of the question was substantially gone into, the only evidence which he did adduce having been examined by the Court, and he having had the benefit of the examination. Under the circumstances of the case, while we affirm the order of the Court below upon the ground I have stated, we do not think that costs ought to be granted to the parties.

The 7th Decem̄ber 1836.

Present :

Lord Bourgham, Mr. Baron Parke, Mr. Justice Bosanquet,
T. Erskine, and Sir A. Johnston.

Evidence (Test in cases of conflicting)—Registration under Section 20 Regulation XXXVII. 1793—Presumption.

Meer Usud-oollah *also called* Shah Chaman,

versus

Beeby Imaman, widow of Shah Khadim Hossain.

There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

The act of Registration after a proclamation under Section 20 Regulation XXXVII. 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other.

Mr. Baron Parke.—THERE Lordships are called upon in this case to pronounce their opinion on a single question of fact with respect to which, however, there is a great mass of documentary and parol evidence on both sides, and conflicting decisions of the Provincial and Sudder Dewanny Courts, between which we are left to decide without much assistance in investigating the truth from either. We must, therefore, determine for ourselves, in the best way we are able, upon the evidence, oral and written, which was adduced on both sides, and which has been laid before us and very elaborately discussed.

The plaintiff, the appellant, seeks by the original suit commenced in 1813, to recover from the defendant a property which he was then in possession. This circumstance alone throws upon him the burthen of proof. He was bound to shew to the satisfaction of the Court, that he had a just title to the possession. The nature of the property is not very clearly explained, but it is certain that it had the character of real estate, being a part of the land revenue of a certain district originally granted by the Mogul Government for religious purposes, or rather burthened with a religious obligation, and subject to it, to be enjoyed by the grantees for their own benefit. This property is denominated a muddud-mash. It had been undoubtedly in the actual possession of those under whom the defendant claimed, and of the defendant herself, prior to and since the year 1761 down to the commencement of the suit. The plaintiff deduced no title to himself by proof of any conveyance from the

original grantees of the Moguls, or from any of the persons who had been in possession ; he was obliged therefore to claim on the ground that the possession of the defendant and her predecessors was legally his own, and that the persons in the actual occupation or receipt of the profits were his agents, and received them on his account. The single question of fact was, in effect, the only question in the cause, and the plaintiff was bound to prove the affirmative. The course which he took for this purpose was, in the first instance, to prove by several witnesses payments of money by Meer Gholam Kullendar, who was in possession prior, to and about 1760 ; and by Beeby Zenut, who subsequently occupied. Those made by her were stated to have been in 1776 or 1777, on the occasion of the plaintiff's marriage, also in 1793 and 1802, and such payments in all amounted to between ten and eleven thousand rupees. He also gave evidence of the expenses of the plaintiff's marriage having been defrayed out of the revenue, and that the ceremony was performed in 1777, when he acted as Malik or owner ; and the like on the occasion of the marriage of a son (whether the same or a different one is left uncertain) in 1793 and 1812. One witness spoke to an act of ownership in the plaintiff or his father in 1783, Beeby Zenut having restored, by his order, the witness's father to a house from which he had been removed ; and several others deposed to declarations of Meer Gholam Kullendar and of Beeby Zenut on different occasions, and particularly in 1776 and 1777, and even by Shah Khadim Hoossain in 1812, that the plaintiff was the real owner of the mash, and the case was then closed. But in a subsequent stage, and a very short time before the judgment was given, the plaintiff gave more parol evidence, and produced three letters appearing to be under the seal of Beeby Zenut, each recognizing the plaintiff's title and that of his father, and he exhibited six copies of papers from the Court of Bhaugulpore, one of which purports to be a deed of relinquishment from Beeby Boodhun to Beeby Zenut in 1767, a durkhast or petition from Beeby Zenut for the management, dated in 1762, and a grant of the management accordingly. The last, if genuine, and duly proved, would have been decisive in the plaintiff's favor ; but these six documents were considered by the Sudder Court as forgeries, and upon that assumption the decree of the Court was founded. A great suspicion undoubtedly attaches to them. But it is not necessary to discuss the question whether there was sufficient proof that they were actually forged, because, at all events, the *copies* were inadmissible, for there was no evidence of a search for the originals. These six papers must therefore be altogether dismissed from the case for that reason, and it must rest, on the part of the plaintiff, on the other documents and the oral testimony.

On the other hand, the defendant called many witnesses to prove that she and those under whom she claimed, acted and were always treated as the owners of the mash, that the plaintiff and his ancestors were never supposed to be so, and several deeds were put in, proving a dealing with the property from a very early period. There were two mortgages from Meer Gholam Kullendar in 1756 and 1761, shewing that he was then acting as owner. In 1765 Beeby Boodhun mortgaged the property. A deed was then put in of the date of 1768, dividing the whole between Beeby Zenut, to whom eight shares were assigned, and Beeby Noorun, who took seven. That both were subsequently in possession was proved by their joining in a lease in 1775, and by one leasing in 1782 her seven shares, and the other mortgaging her eight shares in 1783. This possession of both is shewn by perwannas to have continued in 1786, and is said to be an absolute possession ; and there is parol evidence on the cross examination of the plaintiff's witness, Mahto, and the examination of the defendant's witness, Bux, that both were at one time in possession, for the latter mentions that there were two cutcherries. A conveyance was then proved of Beeby Noorun's share to Beeby Zenut in 1789 ; after which, in 1791 and 1793, the latter leases as sole owner, and conveys the whole, in 1796, to Shah Khadim Hoossain, her nephew, of whose actual possession in 1794 parol evidence

was given ; and four leases, two of the subsequent dates of 1799, 1800, and two of 1805, were produced, all purporting to be made by Shah Hoossain alone, and proving that he acted as owner from that time.

From this outline of the defendant's case, so far as I have stated, and without advertg to two important facts, which I shall afterwards notice, it appears that a title is deduced from Beeby Boodhun to the defendant, and confirmed by regular acts of ownership exactly corresponding with the documentary title. On contrasting this case with the plaintiff's, several observations occur in favor of its truth. So far, indeed, as relates to the acts of ownership of Beeby Zenut, it is not absolutely inconsistent with the plaintiff's case, which admits her to be in possession, and being so, she might deal with the estate by leasing and mortgaging it as her own : but the acts of ownership of Beeby Boodhun and Beeby Noorun are altogether inconsistent, and cannot be explained upon the plaintiff's hypothesis, and they are very distinctly and satisfactorily proved. Again, the admissions of title sworn to as having been made by Meer Gholam Kullendar and Beeby Zenut and Shah Khadim Hoossain or Borge, are wholly at variance with their solemn acts ; for these declarations are said to have been made about the very times that these persons were actually conveying the property as their own, and it is impossible to suppose that, when they were acting as owners, and in their own right, they should be admitting to witnesses that they had no right at all. Much greater credence is to be given to their acts than to their alleged words, which are so easily mistaken or misrepresented. As to the proof of payments, their amount is small compared to the actual revenue : and it may be true that, considering the connection of the families (for the plaintiff married Beeby Zenut's niece), money has been occasionally sent as an act of bounty and the expenses of the marriage of the plaintiff may also have been defrayed, in part or in all, by her. But if the proceeds of the mash had really belonged to, and been remitted to the plaintiff down to the commencement of the suit, which the plaintiff alleges, whatever difficulty there might have been to have proved such payments at a more remote period, there certainly would have been none in giving abundant evidence, in recent times, by numerous living witnesses ; but the proof, instead of growing stronger, becomes weaker the nearer we approach to the present period, and no remittances whatever are shown to have occurred since 1802.

The restoration of the witness Mahto's father in 1783 by Beeby Zenut, at the request of the plaintiff's father, may have a foundation in truth, without leading to the inference that the father was the malik ; and it is to be observed that it is at variance with a fact asserted by other witnesses of the plaintiff, namely, that in 1776, seven years before, the plaintiff himself was the owner of the property.

I proceed to the written evidence. The three letters alleged to be from Beeby Zenut are open to much observation : they were brought forward late in the case, after the plaintiff's vakeels had closed their cause, the last of them on the very day of the decree, when the opposite party had no opportunity to contest their genuineness, and that was not proved, except by the similarity of the impression of the seal with that of a seal produced by the defendant.

The first of these letters, which, according to the testimony of a witness named Golam Hoossain, was written in 1793, is addressed to Mahomed Meer as the malik, whereas it is proved by several of the plaintiff's witnesses that the plaintiff himself filled that character in 1776. The second, dated 1797, might, if true, have been confirmed by the production of the account therein referred to ; and if it had been really written by Beeby Zenut to the plaintiff, it is singular that, after the strong entreaties it contains that the plaintiff would come over on account of her age, infirmity, and failure of sight, he should have permitted her still to continue his agent till her death, which happened nine years afterwards.

The third letter is open to no observation peculiarly belonging to it, but all are very inconsistent with the solemn acts, leases, and mortgages, proved on the other side on corresponding dates, a lease in 1765 by Beeby Boodhun, in 1793 by Beeby Zenut, and a conveyance by the latter in 1796 to Shah Khadim Hoossain of all his estate.

We should therefore feel little difficulty in deciding on which side the truth lay, if we had nothing else to guide our judgment than the comparison of these conflicting acts and declarations, parol and written, on one side and on the other; but we are not thus confined. There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

Now, there were two facts most distinctly established. The first was, that in pursuance of a notice given according to Regulation XXXVII. 1793, Section 20, Shah Khadim Hoossain in 1797 entered his claim in the public records as the owner of this mash, deriving his title by grant or tumleek-namah from Beeby Zenut, dated in 1796, and no proof was given on the part of the plaintiff that he ever was, or claimed to be, registered as the owner. The second fact was that, although the plaintiff's case proceeded on the ground that Beeby Zenut and Shah Khadim Hoossain were in possession as his agents, and accounted to him for the profits, yet he produced no single account-current or duftar for any part of the time. These two facts, then, being undoubted, we have to consider whether the case on the part of the plaintiff can be reasonably reconciled with them. If that case were true, is it likely that the claimant, who lived fifty or sixty miles from Patna, would have abstained to bring forward his claim on so important an occasion as that which occurred, when the Government called upon all persons having title to property of this description to appear and enter it on public Registers, in order to prevent its being forfeited to the Government? This fact is most important, not because the Registers themselves are at all of the nature of conclusive evidence of title (for the Regulations provide against that), but because this act of registration after a proclamation amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill health of the claimant, or absence in a distant country, or ignorance, afford an equally strong presumption of the non-existence of any title on the other. Again, if the plaintiff was for near fifty years the owner, having either the whole of the mash or the surplus of its revenues, after satisfying the supposed religious purposes for which it was given, is it to be believed that he would not have had a regular annual account, at all events some occasional statement, from his agents, of the receipts and disbursements? and we have the means of knowing, from the assistance we receive at this Board from persons conversant with the subject, that the natives are particularly exact in keeping written accounts.

For these reasons, we are of opinion that the weight of evidence is in favor of the defendant, and that the claimant has by no means satisfied the exigency of the law, which throws on him the burthen of proof. We therefore affirm the decree of the Sudder Dewanny Adawlut, and we are of opinion that it must be affirmed with costs.

Lord Brougham.—Did the appellant sue in *forma pauperis*?

Mr. Miller.—I am not aware, my Lord.

Judgment affirmed with costs.

The 17th December 1836.

Present :

Lord Brougham, Sir L. Shadwell, Mr Justice Bosanquet, T. Erskine, and
Sir A. Johnston.

Evidence—Production of Account Books.

Sorab-jee Vacha Ganda,

versus

Koonwur-jee Manik-jee.

One party, by merely producing his own books of account, cannot bind the other.

Sir L. Shadwell.—On the 6th of April 1813, Koonwur-jee Manik-jee, the respondent in this appeal, brought his plaint in the Zillah Court of Surat against Mun-jee Bhaee and the respondent Sorab-jee, alleging that they had dealings with him, that their account-current was regularly adjusted by their gomastahs up to 1860, and that on the 9th Poos-sood 1862 there was a balance in the respondent's favor of rupees 7,132-1-60. His claim against the defendants was for that sum principal and interest, equal in the whole to rupees 13,689-0-75; from which he deducted rupees 2,125 principal, and 2,070-3-6 interest, making 4,195-3-6, on the acceptance of Hormuz-jee Bheem-jee, who, it was alleged, had not paid the plaintiff a *rea*, leaving a balance against the defendants of rupees 9,043-1-69. The defendants answered separately. The appellant denied having settled accounts with the plaintiff's gomastah.

In support of his case the respondent produced an extract from his own accounts. Two letters were also put in evidence and some witnesses were examined. The inference from the letters rather was, that there had been separate transactions between the respondent and the appellant; but there was no evidence to shew that the appellant was privy to the respondents accounts. The Zillah Court, however, on the 24th of May 1815, decreed that the defendant should pay to the plaintiff the sum of rupees 7,132-1-60 according to the dufters of the plaintiff.

The respondent, on the 17th of October 1815, brought another plaint in the Zillah Court against Mun-jee Bhaee and the appellant, to recover the 2,125 rupees and interest, and on the 26th of March 1817, the Court decreed that the defendants should pay to the respondent the 2,125 rupees and interest. The only evidence in that suit was, that the 2,125 rupees had not been paid to the plaintiff: no additional evidence was offered to shew that the defendants could be bound by the plaintiff's accounts.

The respondent appealed to the Provincial Court against the decree of the 24th of May 1815, because interest had not been allowed him on the sum recovered, and the Provincial Court, on the 10th November 1815, decreed the appellant and Mun-jee Bhaee to pay the interest which had been disallowed by the Zillah Court, and the costs of the appeal.

The appellant appealed to the Provincial Court from the decree of the 24th of May 1815, but on the 23rd of July 1816 the Provincial Court affirmed the decree.

The appellant also appealed to the Provincial Court from the decree of the 26th of March 1817, but on the 14th of April 1818 the Provincial Court affirmed it.

Upon three distinct appeals to the Court of Sudder Dewanny Adawlut, in two of which Sorab-jee was sole appellant, and in the third he and Mun-jee Bhaee were joint appellants from the three decrees of the Provincial Court, those decrees were affirmed with costs by three decrees, two of the 25th of March 1818, and one of the 12th of May 1819.

The appellant, Sorab-jee, has presented his appeal to His Majesty in Council against those decrees of the Sudder Dewanny Adawlut. It is observable that, if the first decree of the Zillah Court were right, its second decree might be right

also ; for the claim for the sum of 2,125 rupees and interest rested on the same ground as the claim by the first plaintiff, and if those decrees were right, the decree of the Provincial Court upon the appeal of Koonwur-jee Manik-jee for the interest disallowed by the Zillah Court, might be right ; but if the decree of the Zillah Court upon the first plaintiff were wrong, then that plaintiff, as well as the plaintiff in the second suit in the Zillah Court and the appeal of Koonwur-jee Manik-jee to the Provincial Court, should have been dismissed with costs.

No evidence was brought before the Provincial Court or the Court of Sudder Dewanny Adawlut, which was not before the Zillah Court, so that the decrees can only be supported, by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable ; and the result is, that all the eight decrees are wrong ; that the three decrees of the Sudder Dewanny Adawlut Court complained of must be reversed as to the appellant, but without costs ; and not only must the decrees of the Provincial and Zillah Courts be reversed, so far as they direct the appellant Sorab-jee to pay principal, interest, or costs, but the two original plaintiffs in the Zillah Court, and the respondent's appeal to the Provincial Court, must, as against the appellant Sorab-jee, be dismissed with costs.

The 8th February 1837.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Vaughan, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Limitation (Section 13 Regulation I. 1800, Bombay Code)—Offer of Compromise
—Residence of Defendant in Foreign Territory.

On Appeal from the Sudder Dewanny Adawlut at Bombay.

Bhaee-Chund and Koosal-Chund,

versus

Purtab Chund.

The offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise (an inference which is never permitted), cannot bring the plaintiff within the exceptions in Section 13 Regulation I of 1800 of the Bombay Code, under which a suit is barred by limitation if not brought within 12 years from accrual of cause of action.

The defendant's residence beyond the limits of the E. I. Co.'s Courts is not a good and sufficient cause within the meaning of the same exceptions, to excuse the plaintiff's delay in suing beyond the 12 years.

Right Hon'ble T. Erskine.—THIS was an appeal from a decree of the Sudder Dewanny Adawlut at Bombay, which formed the last of a series of proceedings in the Court of that Province upon the question now pending for the final decision of His Majesty in Council.

The first of these proceedings was a complaint filed in the Zillah Court at Surat in the year 1819, against Roop Chund, since deceased, by the present respondent Purtab Chund, suing *in forma pauperis*, in which he claimed, as heir of his late uncle Pana Chund, deceased, the sum of 3,477 sicca rupees, and an equal amount of interest upon a note-of-hand, alleged to have been given by Roop Chund, in the year 1792, to Koorum Chund, the partner of the respondent's uncle, Pana Chund, to secure the amount of the balance then due from Roop Chund to the partnership. After several intermediate proceedings in the Zillah Court and in the Sudder Adawlut, which it is not necessary to particularize (during which the defendant Roop-Chund died, and the present appellants intervened, and were admitted to defend the suit), the cause came on before the Zillah Court for final hearing on the 14th of February 1823. The defence set up during these proceedings by Roop Chund, and afterwards by his heirs, was, *first*, that Roop Chund never owed anything to

Pana Chund or Koorum Chund. *Secondly*, that the note produced had been fraudulently obtained from the widow of Koorum Chund by the plaintiff, who had no legal interest therein or right to sue thereon. *Thirdly*, that the supposed cause of action had arisen more than twelve years before the commencement of the suit, and was, therefore, barred by the Regulations of the Company.

In reply to the *first* defence, the plaintiff relied upon the production of the books of account and the note. In reply to the *second* defence, it was stated that, after the death of Koorum Chund, and the respondent's uncle, Pana Chund, he, the plaintiff, came to a settlement of the partnership accounts with the widow of Koorum Chund, who, having received from him her dues, gave him a deed of release, whereupon he took possession of the *dufter* and the note as having the exclusive right to them. In reply to the *third* defence, he relied upon the fact that the note was executed at Poonah, where Roop Chund resided, and that he had never been at Surat since, until just before the commencement of the suit; and further, that Roop Chund on his arrival from Poonah in 1819, had admitted the justice of his claim, and had offered to pay a sum of money by way of compromise.

The widow of Koorum Chund was examined upon interrogatories exhibited by the direction of the Court, and stated in substance that the note had no reference to any partnership concern between Koorum Chund and the plaintiff's uncle, Pana Chund, but was given for money due to her husband alone, and that the release was executed by her without reading it, and was intended to relate only to charities and other like expenses. That at the time she executed it, she did not give the note to the plaintiff, but that he stole it, together with her books and papers.

The Zillah Court, upon consideration of the whole case, was of opinion that the evidence of Koorum Chund's widow was fatal to the plaintiff's claim, and also that the plaintiff had not shown in proof why the Statute of Limitations of twelve years should not bear upon his case, and, therefore, passed judgment against the plaintiff, and decreed that one-half of the fees of the defendant's vakeel should be recovered from the defendant, and the remainder from any property that might be found to belong to the plaintiff, and the fees of the plaintiff's vakeel should also be recovered from any property found to belong to the plaintiff. The cause was carried back by appeal to the Sudder Adawlut, before which fresh evidence was taken, relative to the several questions raised before the Zillah Court, and on the 3rd of June 1823, the Second Judge, before whom the cause was heard, recorded his view of the case, delivering his opinion, for the reasons therein stated, that the decision of the Zillah Judge should be reversed, and the amount of the note with interest and costs in both Courts should be awarded to the plaintiff below and their appellants, and referred the case for the consideration of the full Court. And afterwards, on the 26th of the same month, the rest of the Court, after considering the documents and proceedings, concurred generally in the view taken by the Second Judge, and determined to reverse the decree passed by the Zillah Court at Surat, and decreed that the sum of 6,954 sicca rupees 3 annas be paid to the appellant by the heirs of Roop Chund, with full costs in both Courts.

Against this decree the present appeal has been lodged, and the case was argued before this Board on the 7th of December last, when the Counsel for the appellants insisted—*first*, that the respondent had made out no right of action against Roop Chund or his heirs; *secondly*, that, as the supposed cause of action had arisen beyond the jurisdiction of the Court at Surat, and as the defendant Roop Chund was not resident within it as a fixed inhabitant, but had only come to Surat for a temporary purpose, the Zillah Court had no jurisdiction in the case; and *thirdly*, that the plaintiff's right of action, if it ever existed, had been barred by the lapse of time.

Their Lordships intimated their opinion in the course of the argument, that the plaintiff's title to sue, unless he had been barred by the lapse of time, was sufficiently established by the evidence, and that as the heirs of Roop Chund had inter-

vened in the suit, and there was no evidence that they were resident at Surat, where Roop Chund had formerly lived, no objection could be raised by them to the jurisdiction, especially as no such point was made by them in either of the Courts abroad, where the fact could have been easily ascertained. It is, therefore, unnecessary to say any thing now upon those points, and the less so because their Lordships are of opinion that upon the *third* objection the decree of the Sudder Adawlut must be reversed, and the plaintiff's suit dismissed. That objection was founded upon the first Regulation of the Governor of Bombay, confirmed in Council in August 1800, for the institution of a Court of Justice in Surat.

By the 13th Article of that Regulation, the Judge of that Court is prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction, to try the demand, and assign satisfactory reason to the Court why he did not proceed in the suit, or that either from minority or some other good and sufficient cause, he had been precluded from obtaining redress. In this case the cause of action arose twenty-seven years before any suit was commenced. Unless, therefore, the respondent can bring himself within one of the exceptions to this prohibition, the dismissal of the complaint by the Zillah Court of Surat must be held to have been right, and the decree of the Sudder Adawlut erroneous. The respondent contended, and the Sudder Adawlut decided, that the case was brought within two of the exceptions—*first*, that the defendant had admitted the truth of the demand; and *secondly*, that the plaintiff was prevented by the defendant's continued residence at Poonah, where the note was given, from procuring a settlement of the bond, and that he had thereby shown that by a good and sufficient cause he had been precluded from obtaining redress.

The evidence upon which the supposed admission by Roop Chund of the truth of the plaintiff's demand rests, is to be found in the depositions of Koosul Chund, Tarar Chund, and of Wugt Chund, Joy Chund, taken before the Sudder Adawlut, and printed in the 23rd and 24th pages of the Appendix D. But when this evidence is examined, it will be found to amount to no more than an offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise, an inference which is never permitted, and which in this case would be most unfair, when the action was commenced while the defendant was absent for a temporary purpose from his usual place of business, to which he was anxious to return. Their Lordships, therefore, are of opinion that the facts stated by those witnesses ought not to be taken as proof of any admission by the defendant of the truth of the plaintiff's demand, so as to take the case out of the prohibitory Clause of the 13th Article of the Regulation. The only other ground upon which the plaintiff seeks to be exempted from the effect of the prohibition is the continued residence of the defendant at Poonah. But no evidence is to be found in any of the proceedings to show that the plaintiff might not, by adopting proper steps, have obtained redress in the Mahratta Courts at Poonah. It was stated, indeed, in the course of the argument, that it was useless for a poor man to commence any proceedings against a wealthy opponent in the Peishwa's Court; but their Lordships cannot, in the absence of all proof, judicially assume this as a fact. It was also urged that the decision of the Sudder Adawlut might be taken as evidence of the opinion of the Judges of that Court, who must be presumed to know how justice was administered in the Native Courts, that the plaintiff could not have procured redress there if he had attempted it. But the Second

Judge who alone gives any reasons for the decree, does not assign this as the reason why the plaintiff was prevented obtaining an earlier settlement of the bond at Poonah, and we have upon this fact the opinion of the Zillah Judge the other way. Their Lordships, therefore, are of opinion that they ought not to adopt these vague surmises as a substitute for the clear and positive proof required by the Regulation in question.

If their Lordships had found that, by a train of decisions in the Courts abroad, the residence of the defendant beyond the limits of jurisdiction of the Company's Courts had been considered a good and sufficient excuse for the complainant's delay beyond the twelve years, they would have considered themselves bound by a practice upon which the plaintiff might have been fairly presumed to have relied, and the case was allowed to stand over for the purpose of enabling the Counsel of the respondent to produce any such decisions, but none can be found. In the absence, therefore, of proof and authority, their Lordships can find no principle on which they can determine that the residence of Roop Chund at Poonah afforded such an obstacle to the plaintiff's obtaining earlier redress, as to exempt him from the effect of the prohibition under discussion. The learned Counsel for the respondent relied very much upon a decision in this country, in the case of *Williams vs Jones*, 13 East, R. 439. But the point argued and decided in that case was essentially different from the question now under discussion. In that case, the plaintiff's claim was clearly brought within the express exception of the Statute, but it was contended that his right of action was gone, because by the adoption of the Statute of Limitations in India, where the contract was made, his remedy had been barred there by the lapse of time, and the decision of the Court proceeded upon the ground that as before the Statute of Limitations the plaintiff's right of action in this country had no limit, and as the circumstances of the case exempted it from the operation of that Statute, his remedy could only be barred by the extinguishment of his right: and as the adoption of the Statute of Limitations in India could only bar his remedy there, but did not extinguish his right, his remedy in this country remained unimpaired.

Here the only question is, whether the plaintiff's case brings him within the exceptions; namely, whether he has shown, by clear and positive proof that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress.

Their Lordships are of opinion that no such case has been made out, and will, therefore, recommend His Majesty to allow this appeal, to reverse the decree of the Sudder Adawlut, and to affirm the sentence of the Zillah Court.

The 8th February 1837.

Present :

Lord Brougham, Mr. Baron Parke, Sir J. Nicholl, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Costs.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Madho Row Chinto Punt Golay,

versus

Bhookun-Das Boolaki-Das.

Appeal by defendant against whom the suit was decreed in the Court of first instance, which decree was affirmed on appeal by the Sudder Adawlut. The Privy Council held that the plaintiff had not made out his case below, and reversed the judgment, but awarded to the defendant costs in the first Court only, and not in either of the Appellate Courts, on the ground that the plaintiff, as respondent, was defending the judgment.

Lord Brougham.—THEIR LORDSHIPS are of opinion that the plaintiff has not made out his case below, and that the judgment must be reversed, there

being no sufficient evidence to fix the defendant with the sum in question ; and consequently the judgment in the first case, and the judgment in the second instance upon the appeal prosecuted to the Sudder Adawlut, must be reversed. It will also follow that the costs in both must be refunded if paid by the present appellant.

Mr. Baron Parke.—They will be reversed of course without the costs of the proceedings here.

Lord Brougham.—Yes, if there is any part not paid, they must be paid ; if leave to appeal was given upon security, there will be no costs to be paid ; but then the question will arise, whether the appellant, the defendant in the Court below in the first instance, and the appellant in the appeal here, ought not to have his costs ? Now, he ought to have no costs of the appeal, but he ought to have his costs in the first Court, where he ought to have prevailed ; he ought to have his costs in the original Court, where there ought to have been a non-suit, or a verdict for the defendant.

Mr. Baron Parke.—There is no ground whatever for the judgment, except the observation of Mr. Lloyd, that they ought to have cross-examined the witness ; but if you look at the evidence, it is clear he knows nothing about it.

Lord Brougham.—If you look at the bottom of page 10, and take the passage, “that he was a gomastah,” and separate it from what goes before and after, you would have some case ; but the top of the next page shews he knows nothing about it.

Mr. Sergeant Spankie.—Yes, my lord, that was my case ; and I thought my learned friend Mr. Lloyd knew better what an examination in the Examiners’ Office was, than to talk of cross-examining.

Mr. Baron Parke.—No inference is to be drawn from not putting questions on cross-examination.

Mr. Sergeant Spankie.—It is shooting in the dark. We ought to send out some people to instruct the agents there.

Lord Brougham.—The costs are considerable ; one cannot help feeling that a single question put by you might have given the case an exceedingly different appearance if that account had been brought home to Chinto Punt.

Mr. Justice Bosanquet.—If Gopal had said he had communicated the receipt of the money, there would have been an end of it.

Mr. Baron Parke.—They seem to have proceeded upon the assumption that the account was sent, which is quite incorrect.

Lord Brougham.—They should have done what Mr. Baron Parke has said ; but there is the report of the bankers, that he delivered in the account to Chinto Punt, that is stated in the judgment, but that is only to be found in the report of the bankers.

Mr. Miller.—Nowhere else.

Lord Brougham.—It is intended to get rid of the statement that he lived in the house.

Mr. Sergeant Spankie.—Yes.

Lord Brougham.—We reverse the judgment without cost ; but any costs paid below by the appellant to the respondent to be refunded, and the costs of the appellant in the Court of first instance to be paid by the respondent, but no costs to be in the Court in which the present appellant was the appellant, and the present respondent was respondent, because the respondent was defending the judgment.

Mr. Sergeant Spankie.—The costs to be refunded in the first Court, but none in the second.

Mr. Brougham.—But the present appellant’s costs in the first Court to be paid by the present respondent.

The Right Hon’ble T. Erskine.—The costs in the Zillah Court to be paid to the appellant, but no costs in the Sudder Dewanny.

The 10th February 1837.

Present :

Mr. Justice Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, Sir E. Hyde East, and Sir A. Johnston.

Appeal to Privy Council—Consolidation of suits.

On Appeal from the Sudder Dewanny Adawlut in Calcutta.

Moofiti Mohummud Ubdoolah and another,

versus

Baboo Mootechund.

Upon the construction of the Statute 21 Geo. III c. 70 s. 21, it was held that two suits (each for less than 50,000 rupees, but both for more than that amount), in which separate judgments were given, could not be consolidated for the purpose of permitting an appeal to the Privy Council, each judgment, when pronounced, having been final and conclusive.

Mr. Miller.—MY LORDS: this is a petition of appeal from Bengal. With respect to the form of this petition, there is an arrangement between the parties, in consequence of which it comes before your Lordships now in this form. This petition prays that His Majesty in Council “will be pleased to take their said appeal in the said two causes into your most gracious consideration.”

Right Hon'ble T. Erskine.—Are there two causes?

Mr. Miller.—Yes, my Lord.

Mr. Justice Bosanquet.—We understand that the appellant in one case is Mo-hummud Ubdoolah.

Mr. Miller.—Mohummud Ubdoolah and Moofiti Mohummud Ismael.

Right Hon'ble T. Erskine.—There is a cross-appeal.

Mr. Miller.—No; the petitioners are the appellants in the consolidated cause.

Mr. Serjeant Spankie.—There were two causes below. There was one defendant in one, and three defendants in the other.

Mr. Baron Parke.—Are you agreed?

Mr. Serjeant Spankie.—As to that fact.

Mr. Baron Parke.—But not as to the result?

Mr. Serjeant Spankie.—No, my Lord.

Mr. Baron Parke.—There are two different cases.

Mr. Miller.—Which were consolidated in India.

Mr. Baron Parke.—What were those two different cases?

Right Hon'ble T. Erskine.—It appears to be an appeal by Moofiti Mohummud Ubdoolah against Baboo Mootechund, and it appears to be an appeal by Mootechund against Ubdoolah; that appears to be a cross-appeal.

Mr. Miller.—It does appear so.

Mr. Baron Parke.—Where are these from?

Mr. Miller.—From Bengal. The petition prays “that the same may be declared consolidated, and heard together as one appeal, and that your order of summons may be issued to the said respondent to appear and put in his answer thereto, and that service thereof upon his agents may be deemed good service, and that an early day may be appointed for hearing the said appeal, and that the said decrees of the Sudder Dewauny Adawlut, in the said two causes, may be reversed, altered, or varied, and that your petitioners may have such further and other relief in the premises as to your Majesty, in your great wisdom, may seem meet.”

Mr. Baron Parke.—What is the amount of the property?

Mr. Miller.—If your Lordship will allow me, I will state the facts of the case.

Mr. Baron Parke.—Will you have the goodness to answer that question?

Mr. Miller.—The amount of the first cause is 19,046 rupees.

Mr. Wigram.—That is the principal.

Mr. Baron Parke.—What is the whole amount of the principal and interest?

Mr. Wigram.—34,476 rupees, and in the other cause it is 19,046.

Mr. Baron Parke.—They are both below the amount.

Mr. Wigram.—They are.

Mr. Baron Parke.—But can you consolidate so as to give us jurisdiction?

Mr. Miller.—We shall endeavour to satisfy your Lordship of that; each of the suits separately is below the amount required.

Sir A. Johnston.—There are two suits brought here by the Company under the Act.

Mr. Miller.—Yes, they are.

Mr. Baron Parke.—What is the Statute?

Mr. Serjeant Spankie.—The 21st of Geo. III. chapter 70, section 21.

Mr. Miller.—The petition states on the 24th of November.

Mr. Baron Parke.—There is a point of law depending entirely upon the construction of the Act, without knowing more of the facts.

Mr. Miller.—There are certain facts in this case which are somewhat material

Right Hon'ble T. Erskine.—We must first be satisfied that we have power to hear it.

Mr. Wigram.—In our Courts you have suits, cross-suits, and supplemental suits and at last the Court acts upon them as one suit. The words of the Act are “in Civil suits, the value of which shall be £5,000.”

Mr. Baron Parke.—There can be no appeal to the King in Council except in suits, the value of which is £5,000.

Mr. Miller.—I shall satisfy your Lordships that, before this case came from India, it was one suit. The petition sets forth that, on the 24th day of November 1818, Baboo Mootechund, of the city of Benares, merchant (the respondent hereto), filed his plaint in the Provincial Court of Appeal of the province of Bareilly against your petitioners, and also against Mooftee Gholam Umbuyee, the father of your petitioners, and one Mohummud Hubeebood-deen, for the recovery of the sum of 19,046 rupees; that is the first suit. It then sets forth that Mohummud Hubeebood-deen never appeared to the said plaint or any of the subsequent proceedings in this cause; and your petitioners, and their said father, duly appeared to the said plaint. It then sets forth that, on the 2nd day of October 1820, the said Provincial Court made a decree. It sets forth that the second suit took place between the parties; that on the same 24th day of November 1818, on which the said respondent filed his plaint in the said cause No. 152, he also filed another plaint against your petitioner, Mooftee Mohummud Ubdoollah alone, for the recovery from him of the sum of 15,430 rupees. The petition sets forth that the said Provincial Court, on the same 2nd day of October 1820, in which they had made their decree in the said cause, No. 152, also made their decree in the said cause, No. 153, whereby they dismissed the claim of the said respondent with costs.

With respect to the second suit, it sets forth, “That on the 3rd of February, 1821, the said respondent appealed from the said decrees of the said Provincial Court in both the said causes, Nos. 152 and 153, to the Court of Sudder Dewanny Adawlut at Calcutta, before which additional evidence was taken in both the said causes. That on the 23rd day of August, 1823, the said Court of Sudder Dewanny Adawlut made their decree in the cause which had been numbered 152 on the file of the said Provincial Court, and was then numbered as 2106 of 1821, on the file of the said Court of Sudder Dewanny Adawlut, whereby they decreed that the said decision of the Provincial Court should be reversed, and the appellants' appeal be decreed.” And the said Court proceeded in their said decree to direct, in the words and figures, or to the purport and effect following (that is to say), “The appellant aforesaid will receive the sum of rupees 19,046-3-3, the principal amount of the bond dated the 1st of Jamadee Vassanee, 1222, Anno Hejira, with interest thereon at the rate of one rupee per cent. per mensem.” The remainder of that I need not trouble your Lordship with. It also refers to the judgment of the Court of Sudder

Dewanny Adawlut, on the same 23rd August, 1823, whereby it was ordered that the decree of the Provincial Court should be reversed.

It then sets forth the Act of Parliament passed in the 21st of George III. Chapter 70. In this Act of Parliament it is stated, "That the said Court should, and lawfully might hold all such pleas and appeals in the manner and with powers, as it theretofore had held the same, and should be declared in law a Court of Record, and the judgments therein given should be final and conclusive, except upon appeal to his Majesty, in civil suits only, the value of which should be £5,000 and upwards. Though, for their greater certainty as to the contents of the said Act of Parliament, your petitioners refer thereto." The petition then sets forth, "That a Regulation for the administration of justice in the presidency of Bengal, aforesaid, No. XVI was passed on or about the 24th of November, 1797."

Mr. Wigram.—They do not dispute the calculation of interest and principal.

Mr. Serjeant Spankie.—A man might charge twelve per cent. interest.

Mr. Baron Parke.—But he must appeal within a certain time.

Mr. Serjeant Spankie.—He must appeal within six months in India, and within twelve months here.

Right Hon'ble T. Erskine.—What are the facts which you say make these two suits one?

Mr. Miller.—The petition further sets forth, "That on the 22nd day of November, 1823, your petitioners presented a petition to the said Court of Sudder Dewanny Adawlut, praying that the said two causes might be re-heard, or that an appeal might be admitted from the said decrees of the said Court therein, to your Majesty in Council."

Mr. Baron Parke.—Now we want to know what the facts are which make these two causes one.

Mr. Miller.—I was about to read the judgment of the Judges who decided the cause below, "That on the 27th day of November, 1823, the said petition of your petitioners was brought on before Courtney Smith, Esq., the Second Judge of the said Court of Sudder Dewanny Adawlut, who was thereupon pleased to refuse the prayer of your petitioners for a re-hearing of the said cause; but with respect to the prayer of your petitioners for the admission of an appeal to your Majesty in Council, he was pleased to express himself on the proceedings of the said Court in the following terms: "On the subject of the second wish submitted, it appears that the appellant himself, in his petition submitting the grounds of appeal in suit No. 2106, states as follows:—"At length, becoming helpless, with a view to institute legal proceedings, I forwarded the bond and the *ikrarnamahs* executed by the defendants, with copies of the *razeenamah* and *khala* of the *kothee* of Moradabad, to my *mokhtar*, who, with the advice of the *vakeel*, converted one suit into two suits." From the tenor of which quotation it would appear that the appellant conceived these two suits to be in fact but one; that the appellant's object was to institute one suit, which was over-ruled by the suggestion of the *vakeel*. Moreover, besides this statement on the part of the appellant, it is gathered from the general scope and tenor of all the papers filed by both parties, and of the orders passed thereon by the Judges of both Courts, that the Judges of both Courts, with the parties themselves, have considered these two suits to be in fact but one. The aggregate of the principal of both suits is rupees 30,475-3-3, and the date of the decision in both suits is one and the same, *viz.*, the 24th of November, 1818, A. D., and it is clear from both the decrees of this Court which have awarded interest at the rate of one rupee per cent. per mensem on the aggregate sum of this principal, that, calculating up to the date of the decision of this Court, the aggregate amount of both suits will exceed the sum stipulated as necessary for the admission of an appeal to England by the 3rd Section of Regulation XVI of 1797, A. D., and that, moreover, the interest runs on until the realization

of the amount decreed. It therefore seems to me that the suits are appealable to England, and that the appeal should be permitted by the Court. And the said Judge, in a further part of the said proceedings, was pleased, amongst other things, to direct that the appeal to England of both suits should be permitted, and that when the appellant should, agreeably to Regulation XXVI of 1814, A. D., petition for the execution of both decrees, and the respondents should fulfil the conditions of an appeal to England, an order would be passed for the security being taken from the appellant, and for the execution of both decrees, and the papers were to be brought before the Third Judge of the Court, who was a party to the issues of both decrees, with a view to affirmation."

Mr. Justice Vaughan.—They appeal to England in both suits.

Mr. Miller.—On the 23rd day of December, 1828, the vakeels of your petitioner, and the said respondent being both present, the said petition of your petitioner was brought before John Shakespear, Esq., the Third Judge of the said Court of Sudder Dewanny Adawlut, and he was pleased to declare that, as the appellant himself has stated in his petition submitting the grounds of appeal that his *Mokhtarkar* ignorantly converted one suit into two, therefore the amount of both suits is, agreeably to Regulation XVI of 1797, appealable to England; it is therefore ordered, in accordance with the opinion expressed to the Second Judge, that in case the respondents shall afford security for the costs of the appeal to England, within a period of one month after ascertaining the sufficiency of the same, an order will be issued, permitting an appeal.

Mr. Baron Parke.—If his *Mokhtarkar* does that to give him some advantage, he must purchase that at the expense of another advantage.

Mr. Miller.—Those are the facts. Now I submit to your Lordships that it is by no means unusual in Courts that suits have been consolidated.

Mr. Baron Parke.—These never were consolidated except for the purpose of being appealed; they never were consolidated during any part of the progress.

Right Hon'ble T. Erskine.—The decrees had been pronounced before they attempted to consolidate.

Mr. Miller.—I will submit to your Lordship what was to be considered the nature of the suits at that time. The prayer was in the alternative, either that the causes might be re-heard, or that there might be an appeal to England. Now I submit that in substance the nature of the order here is a judgment upon a re-hearing. I submit that is similar to what takes place here upon further directions. Supposing this cause had been re-heard, it would not have been incompetent for your Lordships to have consolidated the two causes if such re-hearing had taken place?

Mr. Baron Parke.—They never did consolidate. In short, you have not any ground to go upon.

Mr. Miller.—I should be extremely sorry to waste your Lordships' time, but this is a point of extreme importance, inasmuch as there may be several such cases.

Mr. Baron Parke.—The Act of Parliament is positive; that we cannot entertain as a suit that which is of less value than £5,000; therefore, whatever the Judge may say, it is impossible for us to admit you.

Right Hon'ble T. Erskine.—If, in the progress of the suit, they had been consolidated, and one decree had been made in the consolidated suit, that would have afforded a different argument.

Mr. Miller.—I am not aware that there is any rule whatever which says that the consolidation must take place at the commencement of the suit, and before any decree has been pronounced, and I think that the consolidation may take place afterwards. Supposing that, instead of the judgments being pronounced in the manner they have been pronounced, the prayer of the petition had been granted, and that a re-hearing had actually taken place, and in that case the suit was to be consolidated, I submit that that would have been precisely the same thing as

what has taken place in this case. It would have been then perfectly competent for this appeal to have been submitted to your Lordships under the Act of Parliament. Then it comes to this, whether your Lordships are now to turn us round mainly in point of form. There is an observation which was made—

Mr. Baron Parke.—A judgment for less than £5,000 is final and conclusive. There are two judgments here, each of them for less than £5,000, and therefore each of them by the words of the Act of Parliament is final and conclusive. If you had got one judgment of the Court below, possibly the Court above might have been in a different case; but you have got two judgments, and the moment those judgments are pronounced by the last Court in India, each is a final and conclusive one. Can you possibly come here after that?

Mr. Miller.—I am ready to satisfy your Lordships, as far as I can, that there can be no doubt what the substance of the judgment pronounced is.

Mr. Baron Parke.—There are two transcripts and two judgments.

Mr. Justice Bosanquet.—What is the judgment that you appeal against?

Mr. Baron Parke.—The judgments they appeal against are the two judgments 152 and 153.

Mr. Miller.—I can only say, looking to the evident meaning of what the Judges expressed, that they intended to consolidate those causes.

Mr. Baron Parke.—They had no power to do it.

Mr. Miller.—Then the question is, whether your Lordships would turn us round upon what, I submit, is a mere point of form.

Sir E. H. East.—The object of the Act is to prevent enormous expense in appealing causes under a certain value. They first go into a Court in India with two causes, encumbering the parties with additional expense, all through the proceedings in India. It is you yourselves that create the difficulty. The spirit of the Act of Parliament as well as the letter is against you.

Mr. Wigram.—I will beg to call your Lordships' attention to one statement here, which is this:—Supposing there were two suits, which had in fact been consolidated, then there would be no difficulty. Now, supposing two matters are comprised in one suit, which would make that suit, in common language, multifarious, so that they might have been separated, and the Court, at the hearing of the cause, should say in one of its proceedings, "We will now sever these suits," I apprehend that would also come within the rule, but I am not called upon to argue that. But here your Lordships see, though it is said in our appeal, that when the case was appealed from the Provincial Court to the Sudder, there was an occasion to take further evidence, and the Court then made an order, by which additional evidence was taken in both the causes. Now I am told that that was actually taken under the order of the Court, and that one order was made in both causes. When they come to speak of what they have done, in giving their reasons why they consider the two suits as one, they say that it is gathered from the general scope and tenor of all the papers filed by both parties, and of the orders passed thereon by the Judges of both Courts, that the Judges of both Courts, with the parties themselves, have considered these two suits to be in fact but one, from the beginning to the end. Now, supposing it appears that they had by that Court been so treated from the beginning to the end, then, in the result, they come to a conclusion which makes one party liable, your Lordship sees it comes to this, that in one suit there is one party suing two parties, and only one in another. The litigation involves a sum of £5,000 in the two suits. Therefore there is, in fact, a stake to that amount? But does not this further point occur, what the parties might have done is this. It appears that upon such petition of appeal to the Sudder Adawlut for leave either to re-hear the cause, or to appeal, they say upon the 23rd of December, 1823, "the Vakeels of your petitioners and the said Respondent, being both present, the said petition of your petitioners was brought before John Shakspear, Esq." Now, they allow the appeal to come over from the order of the Sudder

Adawlut, in a form in which, according to the practice of the Court, there has been consolidation. Now, if the practice there is to treat two suits as one, on account of the position of the parties, these are, according to the practice of the Courts, but one suit.

Mr. Baron Parke.—Here it is two different people—One suit is against one, and the other against two. These are two different defendants in one suit; there is a joint debt and a several debt: we should not allow them to be joined here.

Mr. Wigram.—Within these two months, before the Lord Chancellor, we had a case where an infant had interest in three several properties, and there were different trustees appointed to each property. A bill was filed against them all, and I advised a demurrer, upon the ground of the suit being multifarious; but the Lord Chancellor decided against the demurrer, upon the ground of whether multifariousness exists or not, always depends upon circumstances. Now, here it is clear that the judgment of the Court is, that the two suits might be conducted as one.

Mr. Baron Parke.—In the case you put, were all the trustees defendants?

Mr. Wigram.—No; my demurrer was upon the ground that Lord Sligo, not being a trustee except in one suit, he had no right to be vexed with another suit. But I use it for this purpose: if, according to the practice of the Courts in India, they do deal with two suits as one, and are in the habit of making orders for examination of witnesses in both suits at once, and to treat them as one cause; if the orders passed by the Judges of both Courts have treated the suits as one; if the Judges of both Courts have considered these suits to be one, suppose that fact to be true and unquestionable, then—

Mr. Baron Parke.—In order to found your argument, you must show that there is only one judgment. If there are two judgments, then, by the express words of the Statute, they are final and conclusive. "The said Court should, and lawfully might, hold all such pleas and appeals in the manner and with powers as it theretofore had held the same and should be deemed in law a Court of Record; and the judgments therein given should be final and conclusive, except upon appeal to His Majesty in Civil suits only, the value of which should be £5,000." Each judgment for a less sum than £5,000 is final and conclusive.

Mr. Justice Vaughan.—These are treated as separate suits.

Mr. Justice Bosanquet.—Suppose a judgment against several underwriters, all depending upon the same point, and those actions are consolidated, as we know they often are, the meaning of which is that the decision of one shall bind no other; in those cases there must be a separate judgment in each. Could a consolidation of those cases give a right to appeal under such a Statute as this?

Mr. Baron Parke.—There the consolidation is of a different kind. Here there are two decrees, and by the express words of the Statute, each of those is final and conclusive. You have two separate decrees here, each of them for less than £5,000.

Mr. Wigram.—This being an important question, I trust your Lordships will give us costs.

Mr. Serjeant Spankie.—We thought it better to take this point, without going to the expense of all the proceedings.

Mr. Baron Parke.—We are now supporting the decree of the Judge below. It ought to be dismissed without costs.

The 10th February 1837.

Joint Family Property (Debt on)—Contribution.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Domun Sing and others,

versus

Kaseeram and Toolseeram.

There being disputes in a joint Hindoo family with respect to the property acquired by the father, the parties agreed to refer the matter to arbitration; and while the arbitration was still pending, certain agreements were entered into by which the parties agreed to pay their equal proportions of a joint debt effected

on the common family property, and that the payment under this agreement should not be delayed by any division of the family property, or by the settlement of the debts due to the family. *Held* that the parties were bound by the agreement to contribute towards payment of the debt in equal proportions according to the interest they respectively had in the family estate.

Mr. Baron Parke.—THEIR Lordships are of opinion, that the decree of the Court below ought to be affirmed. In this case the action was founded upon an agreement alleged to have been made by the appellants to pay their equal proportions of a joint debt effected on a common family property. It is clear that that common family property was divided in 1799, and it is clear that there were then several agreements entered into, and the first question in the case turns upon the meaning of those agreements. If it was the meaning of them that the Bankers' claims were to be paid by all the five persons in equal proportions, according to the interest they respectively had in the family estate, and that that was to be done by the settlement of the accounts between the parties, it is clear that the respondents were right in bringing this action against the present appellants for four-fifths of the Bankers' account, and that question depends upon the construction of these agreements which were entered into between the parties after the reference that took place in 1799.

Now, none of their Lordships have any doubt upon the construction of those agreements. It appears that there had been disputes between the family twith respect to the property acquired by the father, and that all these parties agreed to refer the matter to certain arbitrators, and while this arbitration was still pending, it appears that they entered into two agreements. One of those agreements is dated the 11th of June 1799, that is, the first of those agreements entered into between the parties, and in that agreement the five sons allege that they have made a division of the landed property, and they agree to pay the Bankers in equal shares, that is, that each should pay one-fifth of those demands. They further state that in case any one of them should be under an inability to do so, and his lands should be sold in consequence, that from their own shares they would make that good, "and that they will certainly and without fail liquidate the "Bankers' demands." Therefore those are demands which all parties agreed should at all events be liquidated.

Then there comes a separate agreement, in which, after alluding to the demands of the Bankers upon which suits were then pending, they go on to provide, that in case there should be other demands they would leave them to the decision of the arbitrators, and they agreed to abide their decision with respect to their quota. That is the provision with respect to an ulterior demand.

And then comes the third agreement, and they having again provided that though they have divided the estates among themselves, the personal property, including cash, still remains in common, agree that all the debts which are due to the estate should be equally divided among them, and they stipulate that the payment of the Bankers' demand shall on no account be delayed until the partition be effected. Therefore they as clearly as possible say, that the engagements with respect to the Bankers' demands shall be carried into immediate effect, and shall not be delayed by any division of the family property, or by the settlement of the debts which may be due to the family to be divided between them.

That is clear to their Lordships as in the agreement between the parties there is nothing to induce us to come to a different conclusion. That being so, the respondents have clearly a right to recover from the appellants four-fifths of all those Bankers' demands, unless the appellants can show some other answer to this right.

Now their first answer is, we have a set-off against the respondents, because Madho Ram their father was indebted to his brothers upon the management of the family concerns, that he received more rents than he had applied, and that case it was competent to them to make out; but there is not a scintilla of legal evidence of their having such a claim against him, and when the Zillah Court referred the case, it is clear that they never at that time brought forward such a claim; and if

they have such a claim, neither the decision of the Court below nor of this Court will prevent them from enforcing it, therefore their appeal must fail, on the ground of their not having brought legal evidence of this set-off.

Another ground which they set up is, that this was referred to arbitrators. Now there is no foundation for saying that it was so referred; there is no legal evidence of that, and that also must fail.

With respect to the last reason assigned in the case of the appellants, that the Courts below erred in directing a deduction of four-fifths of 1,912 rupees instead of directing a deduction of four-fifths of the difference between 1,912 rupees and the original sum, it is quite clear, I think, that there is a mistake in the wording of the decree in that respect, and that the sum was not meant to be reduced to 1,912 rupees, but reduced by 1,912 rupees. It was not likely that so large a demand as 8,000 rupees should be reduced to 1,912, and therefore we must take it that 1,912 rupees were to be struck off from 8,000, and then the decree is perfectly right in giving credit to the respondents for four-fifths of all sums, and the result will be, that the decree of the Sudder Dewanny Adawlut must be affirmed with costs.

Mr. Miller.—I trust as the Sudder Dewanny Adawlut did not give the opportunity—

Mr. Baron Parke.—You have that opportunity still; if Madho Ram is indebted to you upon the balance of the account, you may sue him.

Mr. Serjeant Spankie.—There is a judgment, on your own shewing, against you, and I allow you an opportunity of recovering that demand.

Mr. Baron Parke.—You may, notwithstanding this judgment, sue him for any balance that is due.

Judgment affirmed with costs.

The 18th February 1837.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine,
Sir E. Hyde East, and Sir A. Johnston.

Sale of Land for arrears of Revenue—Kistbundy or Instalment-bond—Surety-bond.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Kirt Chunder Roy and others,

versus

The Government and Mohunny Mohun Thakoor.

By Regulations XIV. 1793 and VII. 1799 the Governor-General in Council may order a sale for arrears of a monthly instalment of Revenue before the close of the year; but in order to warrant that act, there must be an arrear of a previous year or of a monthly instalment.

The existence of a written engagement or Kistbundy is not a condition precedent to the right to enforce the payment of the Revenue by monthly instalments, provided the monthly instalments be fixed and determined.

By Regulation V. 1812, if there be an arrear of the annual assessment or of a fixed monthly kist or instalment of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the whole estate of the defaulting zemindar to be sold.

Where the monthly instalments are fixed and determined, the Government does not forego the right of selling the zemindary on default being made to pay these instalments, by taking a bond from sureties by which the estates of the sureties also were rendered liable for the due payment.

Mr. Baron Parke.—As this case is represented to be one of great interest to a numerous class of persons in India, their Lordships were desirous of hearing both the learned Counsel for the appellants before they gave their decision. We have now had the opportunity of considering all the arguments which could be adduced in support of the appeal, and of carefully examining the pleadings and proceedings in the Native Courts; and as we feel no doubt as to the course we ought to pursue, we think it unnecessary to trouble the Counsel for the respondents. We are of

opinion that we must recommend to His Majesty to affirm the decree of the Sudder Dewanny Adawlut.

The question is, whether the sale by the East India Company to the other respondents of the zemindary of Edilpore, was *legal*. Whether, if the Company had a right to sell, they used unnecessary harshness towards the appellants in the exercise of that right, is a point on which it is not within our province to form an opinion; that question must depend upon the general state of the revenue at the time, the habits and dispositions of the people, and a variety of considerations which can have no place in a Court of Justice:—our duty is to decide upon *legal* rights, and we best discharge that duty when we strictly confine ourselves to its performance.

The right of the East India Company to sell depends upon two points; *first*, whether there was in this case such an arrear of revenue as to authorize a sale; and *secondly*, if there was, whether the entire zemindary could be sold in order to satisfy that arrear. The law on this subject is contained in the Regulations, and is very clearly and distinctly expressed.

The first of these to which it is material to advert is the 14th Regulation of the year 1793. That Regulation recites the importance of arming the Collectors with power to enforce the discharge of the annual revenue without the assistance of the Courts of Justice, making those officers responsible to the parties for the due exercise of their powers. It states that, as the Collectors have in their possession the engagements of the proprietors and farmers, specifying the amount of the annual revenue they have agreed to pay, with the monthly proportions in which it is to be discharged, the Collectors cannot suffer by unjust prosecutions, and on the other hand, the proprietor and farmer will be able to prevent the powers of the Collectors being exercised to their detriment, by performing punctually the engagements they have entered into with the public. It then proceeds to enact that, if the whole or a portion of the kist or instalment payable in any month by a proprietor or farmer of land shall remain undischarged on the first of the following month, the sum so remaining unpaid shall be considered as *an arrear of revenue*. The Regulation then specifies the powers with which the Collectors are armed for the *recovery* of arrears, by causing the defaulter to be confined, and appointing an Amin or receiver; and by the 13th Section, at the end of the year, if an arrear shall remain due, the Collector is to communicate the amount to the Board of Revenue, who are to report to the Governor-General, and recommend the sale of such a portion of the estate of the defaulter, as may be sufficient for the liquidation of the amount; but lands are not to be sold in any case without the sanction of the Governor-General in Council. By Section 23 Regulation VII. 1799, if the revenue due to Government is in arrear at the close of the year, the Collector is to report to the Board of Revenue, and to recommend the sale of lands sufficient to make good the arrear, and the interest to the time of sale. But no part of that Regulation is to be understood to preclude the Governor-General in Council from ordering a sale of land within the current revenue year, in any particular case wherein he may judge it proper to order such sale within the year.

If the sale of lands is ordered at Calcutta, security to contest the claim must be given to the Collector eight days prior to the day fixed for the sale, of which day proclamation is to be made not less than a month before.

From these Regulations it is clear that the Governor-General in Council may legally order a sale for the arrears of a monthly instalment before the close of the year, but in order to warrant that act, there must be an arrear of a previous year or of a monthly instalment.

It is said for the appellant that there can be no such monthly instalment, unless there be a written engagement, or kistbundy, signed or recognised by the zemindar, specifying such instalment, as well as some instrument agreeing for the annual amount, and much stress is now laid on this objection, although it was not brought forward in the Provincial Court,

There is no doubt that it is most desirable that the Collectors should take, in every instance, a written engagement signed by the parties to be charged. It appears by the recital in the Regulation of 1793, that it is intended that he should do so for his own protection from vexatious suits, and unquestionably he ought to do it for the benefit of zemindars also; but although such an instrument was supposed by the Governor-General in Council, in enacting that Regulation to be likely to exist, its existence is not made, either expressly or by implication, a condition precedent to the right to enforce the payment of the revenue by monthly instalments. If the annual amount of revenue be fixed and agreed for by the zemindar, though not by writing, to be paid by *certain ascertained* monthly instalments, the powers given by the Regulation attach. The kist or instalment in such case is "*payable monthly*" within the provisions of the Regulation of 1793; upon this point the decrees of the Provincial Court and the Sudder Dewanny agree. The Judges of both consider that the want of a written instrument constitutes no objection, provided the monthly instalments be fixed and determined, though the Courts differed in opinion upon the facts, as to the existence, in this particular case, of that certainty in the amount of the monthly payment, which is an essential requisite in order to authorize a sale within the year.

If that requisite be complied with, and an arrear exist, the portion of the Regulations to which I have referred clearly authorizes a sale by the Governor-General in Council within the year.

Does this Regulation authorize a sale of *the whole zemindary*, or only of such a part as may be reasonably sufficient to satisfy the arrears; that is, if more than such a portion be sold, is the sale invalid, and does the purchaser acquire no title? A short consideration of other portions of the Code of Regulations will place this point beyond doubt.

We have before seen that the Collectors are to recommend a sale of such a portion only as may be sufficient to raise the arrear. By Regulation I of 1801, Section 6, the unqualified operation of the rules as to the selection of such a portion of the land of the defaulter as may appear to be sufficient, is said to have operated prejudicially to the public interests as well as those of the proprietors themselves; and where the jumna does not exceed 500 rupees, the Board is authorized to sell the entire estate, and where it exceeds that sum, they may still sell the whole when, from the best information they can obtain of the value, the surplus over the arrear is likely to be inconsiderable.

If the provisions of the Regulations had stopped here, it might well have been doubted whether the intention was not to vest a discretion in the Revenue Board not capable of being impeached, by a suit in the Courts, to set aside a sale made by them and invalidate the title of the purchaser; though it seems to have been the opinion of the Court of Sudder Dewanny in the case cited from 3 Macnaghten, page 5, that a sale effected before 1812 could be set aside on that ground. But all doubt on this question is removed by the enactments of the Vth Regulation of 1812, which expressly declares:—"That the consideration of, and decision on the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it, is hereby declared to reside in the Board of Revenue and Board of Commissioners respectively, subject to the control exercised by the Government, in its executive capacity, in matters connected with the public revenue." Then it proceeds to enact that "no means existing by which any certain or accurate computation can be formed *a priori*, of the real value of any estate, or portion of estate, which may be exposed to sale for the recovery of arrears of public assessment, or of the adequacy of the price which may be offered for such estate, or portion of estate, it is hereby declared that sales made at public auction for that purpose are not liable to be annulled by the Courts of Judicature, on the ground that the proceeds of the sales have materially exceeded the amount of the arrears due from the proprietor of the lands to Government. The Board of Reve-

"nue and Board of Commissioners will be guided in cases of that nature by their own discretion ; subject of course to any instructions with which they may, at any time, be furnished by the Governor-General in Council."

It would be difficult to find language better calculated to do away with all objection, on the ground of excess, as to the validity of sales made by order of the Revenue Board, under the sanction of the Governor-General, where an arrear existed, and it is impossible to deny that such a provision is founded on just views of convenience and policy ; for if sales were to be questioned, and conveyances annulled by Courts of Judicature, on the ground that too much had been ordered to be sold according to *their* view of the value of the estate, no title would be safe, no purchaser could be sure of holding his estate ; for nothing could be more doubtful and uncertain than the determination of questions of probable value by the Judges of the Adawlut Courts. All this mischief is obviated by the Regulation of 1812, by which the discretion as to *quantum* is vested in the Board of Revenue, and sales by public auction under their authority are rendered absolutely secure from all objection as to excess.

The law therefore is clear that if, there be an arrear of the annual assessment, or of a *fixed monthly list or instalment* of that assessment unpaid on the first day of the following month, the Governor-General in Council may order a sale, and the Board of Revenue may direct the *whole* estate of the defaulting zemindar to be sold. That this is the law, is distinctly admitted by the appellants themselves, who in their answers to the reasons of appeal, pages 80, 81, acknowledge that, if there be a single defaulted rupee, the authorities may dispose of the estate, provided always that there be a just demand by the Government, and the zemindars refuse to answer it.

It remains for us to apply the law to the facts of this case.

And *first*, that a sale was ordered by the Governor-General in Council is undoubted. This fact has not been questioned in either of the Courts below, nor can the point be now raised, that the Governor-General ought to have assigned some special reason for the sale. If such an objection could be tenable under any circumstances, it cannot be allowed at this late stage, inasmuch as if it had been urged in the Courts below, it might have been at once disposed of by proof of the fact, that there were such reasons, and that they were assigned in the order.

The only remaining question of fact is, whether there was an arrear of a fixed annual assessment, or of a fixed monthly instalment of such assessment.

That the zemindar of Edilpore was assessed at the annual jumma of Rs. 54,996-15 is undoubted. The ancestors of the appellants, at the time of the annual settlement, gave in a durkhast for that amount. The appellants stated the same amount as annually due, by a petition to the Collector in 1811, and the first fact asserted in the appellants' petition to the Governor-General is that such was the amount of assessment, and there is no contradictory evidence or question raised on that head.

Was this payable by fixed monthly instalments ?

It was contended on the part of the appellants that, in the absence of a written document (which in the Sudder Dewanny, but not in the Court below, they insisted to be necessary), the custom was for six annas out of each rupee, or three-eighths of the entire annual revenues to become due in the month of Bhadoon, and that on that supposition nothing was in arrear at the time of the sale which took place on the 16th November 1812. If we assume this mode of calculation, it appears still that there was a small arrear of revenue both at the time of the proclamation for sale, the 26th of October 1812, and on the 25th Katik, 9th November, the last day on which, according to that proclamation, the arrears were receivable at the Collector's treasury. The sum due in Bhadoon would, on the six anna calculation, be rupees 20,623-13-10½ ; and it appears by the treasury receipts that before the 25th Katik 20,109 rupees only were actually received, which would leave a balance of Rs. 514. But on the 12th November there were paid 2,499 rupees, or according

to the extracts of books of the Collector's proceedings, Rs. 2,400, though the latter is probably a mistake, and the Collector is admitted to have had orders from the Government to receive cash for arrears, even after the day mentioned in the advertisements; and therefore if this sum of Rs. 2,499 was received in part, on account of the arrears of Bhadoon, it might be very questionable, if after that receipt, and the notification of it to the Board of Revenue, which arrived on the 16th November, the day appointed, the sale would be legal so far as it depended upon the arrears due in Bhadoon (which, as it will subsequently appear, it does not). But if a portion of the Rs. 2,499 is to be applied to discharge the arrears of the annual revenue due in Bhadoon, then another difficulty arises; there would be an arrear of a portion of the instalment for three months, payable upon the engagement entered into by the appellants to the Government on the 14th of July 1804, and the sale of the zemindary would be lawful for this arrear, if the appellants were bound by that engagement. It was subscribed by them: it admitted the arrears then due to be 102,902 rupees 3 annas 12 gundas and 3 quarters: it specified the mode of payment from 1211 to 1219 inclusive, to be 833 rupees for all the months in the year except the last. These monthly payments were, at all events, *fixed and ascertained*, and there can be no question but that the Government did not forego the right of selling the zemindary, if default should be made in paying these instalments, by taking, as they did, a bond from sureties, by which the estates of the sureties also were rendered liable for the due payment.

But it is said, on behalf on the appellants, that they were not bound by their engagement of July 1804, because it was obtained by a sort of duress, namely, the threat of an illegal sale of the zemindary, for the whole arrear of a lac and upwards due at that time. It is unnecessary to enter into the details of that transaction. If the sale was not legal, the zemindars should have questioned it at that time in due course of law. They did not choose to do so, but entered into an engagement with the Government to pay the arrear in ten years, by which they waived all question as to the arrear being really due, in consideration of a great extension of the time of payment, unaccompanied by any charge of interest. With that engagement, they complied for seven years and upwards, and it is quite impossible for any Court of Justice to allow such a transaction to be now impeached and set aside.

But independently of these considerations, from which it appears that there must have been an arrear of revenue to authorize a sale, even supposing the six-anna custom of computation to apply, their Lordships have no doubt, but that the view taken of the case by the Sudder Dewanny Adawlut was correct. Although there were variations in the monthly instalments during the early part of the time, in which the zemindary was under the management of the appellants, namely, from 1211 to 1219 (1804 to 1812,) yet for the seven last years the sum demanded up to the end of Bhadoon was always Rs. 26,319-12, and the several monthly payments composing that sum, according to the towjees, except in the year 1216, corresponded exactly, and the kistbundy in the Government office for that year agreed with the towjees for the other years, so that there was ample proof of a constant course of uniform payment by fixed monthly instalments for seven years, forming abundant evidence of an agreement between the Government and the zemindars, for the payment of these instalments.

On this view of the case, there was an arrear of the revenue of 1219 due on Bhadoon, at the date of the proclamation of sale, of upwards of 10,000 rupees, and at the time of the sale itself there was still an arrear of Rs. 6,210-12, comprising three monthly instalments of the old arrears, if those instalments are not to be taken to have been paid by the sum of Rs. 2,499 on the 12th of November, and if they were, then the whole of the arrear of Rs. 6,210-12 was for the revenue of 1219 up to that month.

The argument for the appellants that this arrear must be considered as having been paid, because the Collector received on the 12th November a security for this sum payable on the 28th, cannot avail them. The duty of the Collector

was to receive in cash, and it is clear from his letter to the Board of the 12th November 1822, that he understood his duty, and took the engagement subject to the approbation of the Board. If, as suggested, he assured the zemindars that they had saved their estate, he went beyond his authority, but it is not improbable that he meant merely to hold out to them the hope that the security would be accepted, in which case no sale would have taken place. This, unfortunately for the appellants, for reasons into which we cannot enquire, the Government declined to do.

Their Lordships are therefore of opinion that the sale was in point of law valid, and the title of the purchaser unimpeached, and will therefore advise His Majesty to affirm the decree of the Sudder Dewanny Adawlut, and with costs.

Mr. Lloyd.—The East India Company do not ask for costs in this case.

Mr. Baron Parke.—You do not ask for costs.

Dr. Lushington.—But I am for the respondent, the actual purchaser, and we submit that our costs ought to be paid.

Mr. Baron Parke.—You will get nothing, as they are paupers.

Dr. Lushington.—No, but the Court of Sudder Dewanny Adawlut reversed the decree of the Provincial Court, and they condemned the present appellants both in the costs of the East India Company and of the respondent. Now, if the East India Company consent not to take the fund from us, then we shall have the means of getting our costs out of the fund, because the appellants, not being in a condition to give security out of the ordinary fund, assented to 5,000 rupees of the purchase-money being impounded as a security. Now I think in justice the East India Company must take care that we are not damnified, inasmuch as we could not look at any question of this sort in taking the title. We could look at nothing that was done by the Company itself as a sovereign power.

Lord Brougham.—The judgment of the Zillah Court was against you with costs;—then you must have back your costs.

Mr. Baron Parke.—You have got them by the decree of the Sudder Dewanny.

Lord Brougham.—The Sudder gave you your costs back.

Dr. Lushington.—It did.

Mr. Miller.—I believe that they also obliged us to pay their costs.

Lord Brougham.—The Sudder gave them their costs against you,—they gave them their costs of the appeal that is affirmed,—my doubt is how far the Zillah Court disposed of the costs.

Mr. Miller.—The Sudder Court not only gave them the costs paid to us, but obliged us to pay to them the costs of the appeal.

Lord Brougham.—The Sudder put itself in the position of the Zillah Court, and gave the judgment which the Zillah Court should have given, which was not only that he should pay back the costs he had got from them by the first and erroneous decree, but that they should get their costs from you, because the Zillah Court ought to have given them their costs in the first instance. And then they had to dispose of the costs of the appeal, and they gave those costs against you. But they ought not to have given them those costs, because that is making the respondent pay for defending his own decree.

Dr. Lushington.—That is the constant practice in the Courts in India.

Mr. Miller.—In a case of this nature, I think your Lordships would by no means think it necessary to give costs against us, contrary to your general rule.

Lord Brougham.—We do not know how that is.

Mr. Miller.—I have no doubt that it was so.

Mr. Baron Parke.—This is the decree of the Sudder Dewanny, that the judgment of the Court below “be rendered null and of no effect, that a decree “be made out in favor of the appellants, and that the whole costs of suit in “both Courts, with the exception of the charges of the additional vakeels ap-

"pointed by Mohunny Mohun Thakoor, one of the appellants, be made payable by the respondents."

Lord Brougham.—Then it is a very extraordinary course. It is not a colorable appeal—we will hear you upon that point of costs if you wish. If you have any cause to shew why, in a case of this sort, the respondent in the Sudder should pay the costs of defending the decree in his favor, why he should be mulcted to the amount of the appellants costs for not totally giving up the decree that he was in possession by the Zillah Court, we will hear you.

Mr. Lloyd.—I believe your Lordship will find that it is the universal practice of the Courts in India to pursue that course.

Lord Brougham.—It is contrary to all our principles in this country.

Dr. Lushington.—I know it is contrary to the practice of the House of Lords so to do; but I know that in one Court it is the uniform practice. I know that the High Court of Delegates uniformly have given the costs from the very original Court in which the suit commenced; it is the usual practice, and it is so now up to the last time they sat.

Mr. Baron Parke.—The principle is that there has been a wrong from the beginning—that there has been a failure of justice.

Dr. Lushington.—The principle is this, that this person had the right upon his side in the first instance, and he is not to suffer in consequence of any error that has been committed by any body.

Lord Brougham.—That is the Court of Delegates. We have not adopted that practice here.

Dr. Lushington.—No, I admit that of late years the custom has not been to do so here, but it was formerly.

Lord Brougham.—Do you mean to say that the practice here resembled that in the High Court of Delegates?

Dr. Lushington.—It was frequently the case. The argument I should address to your Lordships would be, that we are purchasers at a public sale under the authority of the East India Company, having nothing in the world to do but to take the title of the property as they give it to us. They had sovereign power.

Mr. Baron Parke.—You took their guarantee for having a right to sell?

Dr. Lushington.—We had no other means, and therefore it would be exceedingly detrimental to those sales going on with advantage to all the persons concerned, if the purchaser turned out to be subject to every cost in maintaining his title.

Mr. Miller.—In a case of this nature, instead of there being anything to call upon your Lordships to depart from the rule which has been pursued, I believe, invariably, I submit to your Lords, that in a case of this extreme severity your Lordships will not visit the original claimant who had the judgment in his favor with the costs.

Mr. Baron Parke.—Nothing can be got out of the original claimant now because he is a pauper.

Dr. Lushington.—Nothing. What I want is, as against the East India Company, to have that 5,000 rupees which has been deposited set free for my demand for costs.

Mr. Richards.—The 5,000 rupees is within your Lordship's jurisdiction. That money was impounded for the purpose of being applied in any way your Lordships might think just.

Mr. Baron Parke.—The East India Company do not claim any part of it?

Mr. Lloyd.—They do not claim any part of it; it was deposited for the costs of the appeal.

Mr. Richards.—The purchaser has been perfectly innocent of any blame.

Dr. Lushington.—All we ask is that the 5,000 rupees should go as far as it will.

Mr. Baron Parke.—The East India Company are willing to remain as they are?

Mr. Lloyd.—yes.

Dr. Lushington.—All that we ask is that these 5,000 rupees may go as far as they will in the payment of our costs.

Mr. Miller.—I fear that I cannot resist the proposal of Dr. Lushington with respect to these 5,000 rupees, provided that sum falls short of the sum that they should pay to us in respect of the costs in the Provincial Court, which I understand your Lordships to be of opinion should be paid to us on the common principle of set-off.

Mr. Baron Parke.—First of all we must decide that these costs are to be set off, because if it is the common practice of the Court, we must not break in upon it. We have done so in some cases.

Mr. Miller.—With great submission to your Lordships in almost every instance your Lordships have done so, and I submit that in this case of extreme hardship your Lordships will not visit us with the costs of the other party in opposition to the decree of the first Court.

Mr. Baron Parke.—We do not know enough of the case to pronounce any opinion about that.

Dr. Lushington.—Your Lordships will feel anxious to indemnify the purchaser as far as you can.

Lord Brougham.—Can you furnish us with a note of the cases in which we have already done that?

Mr. Miller.—I will furnish your Lordships with that.

Lord Brougham.—And whether the costs in the Zillah and in the Sudder have been paid below?

Dr. Lushington.—With deference I should say this, that whatever might be the nature of the precedent, or whatever determination you might come to, supposing you were to say that you would reverse the decree of the Sudder as regards the Company, you would not reverse it with regard to us, we stand in a different predicament. At any rate we should have it.

Mr. Baron Parke (to Mr. Clarke).—You have seen a great number of these cases. Is it the constant practice to give the costs where they reverse the decree in the Zillah Court?

Mr. Clarke.—The costs always follow the original decree; but if the judgment in appeal reverses the original decree, the costs generally go with it.

Lord Brougham.—If the Zillah Court decides for you, and you go to the Sudder, you pay the costs of the appellant in the Sudder, because the decree is reversed?

Mr. Clarke.—That is the common practice in India.

Dr. Lushington.—And in most of the Colonies, I believe.

Mr. Miller.—If your Lordships will allow me I will endeavour to furnish you with cases upon that point.

Dr. Lushington.—In the appeals from the Admiralty Courts abroad, it was the universal practice. Lord Stowell always gave the costs when he reversed the decree; I remember one very important case of a Lieutenant, who had made a seizure in the Island of Antigua, where the seizure was held to be illegal, and his claim to the forfeiture was annulled with costs. Lord Stowell reversed the whole and gave the costs in both Courts, that is a reported case.

Lord Brougham.—Mr. Miller, when shall you be able to give a note of these cases?

Mr. Miller.—If there are any cases, within a few days.

Lord Brougham.—It must be before Wednesday morning.

Mr. Baron Parke.—Then it will stand in that way, that the respondents have their costs of this appeal out of the 5,000 rupees, and that will be subject to the

question, whether they are to refund the costs they have received in the Sudder Adawlut. The East India Company pay their costs, and the purchaser is to have the costs of the appeal, subject to the question whether he is to refund any part of the costs.

The 16th May 1837.

Present :

Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Sir E. Hyde East, and Sir A. Johnston.

Evidence (Alterations in instrument)—Practice of Privy Council (in cases of appeal from concurrent judgments) statements of a fact by a Court conclusive.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Petamber Manikjee

versus

Moteechund Manikjee,

If an instrument on which a case depends, should appear to have been altered, it cannot be received in evidence or be acted upon till it is most satisfactorily proved by all the subscribing witnesses at the least and other evidence that the alteration was made antecedently to the signature.

The Privy Council, in cases depending upon facts which have received the concurring judgments of two Courts in India, will not set aside, the last judgment unless it can see very clearly that that judgment is wrong.

When a Court of Justice states a fact, that fact is conclusive in the case.

Lord Wynford.—THIS is, in fact, an appeal against two judgments: the judgment of the Zillah Court confirmed by the Sudder Adawlut, the latter Court making no observations, but merely confirming the judgment given by the Court below.

The question depends entirely upon facts, and in a case coming before this Court, depending upon facts which have received the judgments of two Courts in India, this Board ought not to set aside the last judgment, unless it can see very clearly that that judgment is wrong. It must be most completely satisfied it was wrong and inconsistent with the justice of the case, and against the facts. So far from that being the case in the present case, I believe their Lordships in general are of opinion that, if those facts had been presented to us in the first instance, we should have pronounced the same judgment pronounced by the two Courts in India. This case depends upon an instrument I will read:—"I, Motee Chund Manikjee, pass this writing to you, Petamber Manikjee. In the money transaction for the district of Petlad with the Patels Jey-bhaee, Samul-bhaee, and Wasta-bhaee Eshwan-das, the persons mentioned below have shares as follows. Bhut Tricum-jee Wussun-jee has five and a half annas, of which Jumna-das Sunkurlal and Bechur Joeta have shares. Rutun-jee Kahan-das, who has a shop at Ahmedabad, two annas in the rupee. You have five and a half annas in the rupee, of which I have a fourth share with Jumna-das Sankurlal and Bechur Joeta. The remaining three annas in the rupee belong to Nursai-bhaee Petamber-das's house, in which Rutun-jee Kahan-das has half (one and a half), and you have half of the remaining three annas and a half, and I the other, being three-quarters of an anna each. In this house I have a fourth share. As is above stated, sixteen annas or one rupee among four persons." On the back of this agreement a paper was pasted, containing an endorsement in the hand writing of the respondent: "Was divided whatever sum have been received, each partner taken his share. Besides this, three thousand five hundred rupees (3,500) is due to you by the house at Dahoor, which you can take when the money comes from Poona, but this money is entered in another book. Until the money arrives from Poona, I shall give

"you interest at the same rate as I usually do."—(Signed) Paruk Motee-chund Manik-jee.

It appears to be subscribed by the respondent in this case, and it appears to be witnessed by the Pundit Hurry Narain, and it is enough for us to say he has given evidence to prove the signature was formerly affixed to it.

It is further witnessed by other parties, but Hurry Narain is the only one who says he saw the defendant execute that deed; none of the other witnesses say that. It is enough to refer to the judgment of the Court below, without going through the circumstances of the case, for when a Court of Justice states a fact, that fact is conclusive in the case; if a Judge at *nisi prius* states a fact, the Court above will not suffer that fact to be enquired into, but takes it upon his statement.

Let us see what the Zillah Court says upon the subject; "On examining this paper it appears that part of the original paper has been cut off, and four lines just above the signature written on the back of it; these four lines and the signature are written in a different hand writing from the first part of the document. The Court, in order to have this point well ascertained, thinks it necessary to shew it to some bankers, and a question is put to the following bankers." But I beg to observe, that the Court found that instrument had been mutilated in the manner stated upon their own view of it without the assistance of the bankers, and that in my opinion gets rid of the objection made to these persons being called in, for we get the fact here stated that the instrument had been mutilated in the manner mentioned, by cutting off a part of the paper, and writing upon it, the paper containing the four lines as it is stated at the back; but as it is printed at the bottom of this paper, it is most material that we should take notice that only one subscribing witness saw this signed, the other three witnesses did not. I put the Pundit Hurry Narain out of the question. If you attend to his statement, it is clear he did not see it. But I do not give much effect to that, as it is not on oath; but of the four witnesses only one of them saw this paper signed, and putting that witness out of the question, why may not some very important lines have been cut off from the original document? cutting the paper off entirely, so that the signature which was at the bottom of the first paper might be added by introducing another paper with those four lines upon it, and the genuine signature applicable to a different transaction is appended to this paper, which is in this state, and but for the evidence of this one witness there is no testimony in this cause which goes the length of disproving that circumstance. Now is there any Court in the world that would receive such an instrument cut in the manner that this is, without more satisfactory evidence than has been produced? If a plaintiff produces a bond in this country, or any other instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature; there is no such evidence here, and this is the whole of the case of the plaintiff below.

There is a circumstance I ought to take notice of: an Ameen of Police says the defendant admitted he was a partner in the house, but I cannot admit that that is sufficient to buoy up an instrument that is beaten down by all the facts that appear.

Under these circumstances, the Court, so far from thinking they have that satisfactory evidence that will enable them to reverse two judgments in India, where the Judges had an opportunity not only of hearing the witnesses, which is a great advantage they have over us in that respect, and where they had an opportunity of seeing this instrument, for though an English Judge might not have understood the writing, the manner in which these alterations were made, might have given us strong reasons for forming a conclusion with respect to this matter, but under these circumstances the Court is of opinion that the appeal must be dismissed, and as this case on the view we have taken of it is founded in forgery

at least, and most likely forgery supported by perjury, we think it ought to be dismissed with costs.

Appeal dismissed with costs.

The 23rd June 1837.

• *Present* :

Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, Mr. Baron Parke,
Mr. Justice Erskine, Sir E. Hyde East, and Sir A. Johnston.

Practice of Privy Council (in case of appeal from concurrent Judgments.)

• *On Appeal from the Sudder Dewanny Adawlut of Bombay.*

Khoorshedjee Manikjee,

versus

Mehrwanjee Khoorshedjee and an other.

The rule upon which the Privy Council universally acts in the case of an appeal from concurring Judgments of the Courts below, is to affirm the last judgment unless they see that it is clearly wrong.

Mr. Baron Parke.—THIS case comes before their Lordships on an appeal against a decree of the Sudder Adawlut, affirming a decree of the Provincial Court, which decree of the Provincial Court affirmed the decree of the Zillah Court.

We have therefore three concurring judgments of the Courts below, upon which we are called upon to advise Her Majesty.

The rule upon which the Board has universally acted is to affirm the judgment, unless they see that the judgment is clearly wrong. In this case, their Lordships, after looking at the evidence, and taking great pains upon the subject, cannot pronounce an opinion that these decrees are wrong; and the result will be that these decrees are to be affirmed.

One question made in the argument to-day was, whether the will or codicil, or either of them, were sufficiently proved. Upon that, their Lordships pronounce no opinion; they do not know that they are agreed upon that part of the case; and if the question was to depend upon this, whether there was proof of the will, it would be necessary to take a little time to consider that part of the case. The ground upon which the Courts have proceeded is that, taking the will and codicil to be proved, the plaintiff has no right to institute a suit to be let into possession of the unadministered effects of the testator; and the ground upon which they appear to have proceeded is that, according to their notion, when the sons were let into possession, there was an end of the right of the executors to interfere. That appears to have been the ground upon which the Court proceeded, that it was not a power of control, to be exercised by the executors from time to time, according to the conduct of the children; but if they shewed a disposition to amend, it was for them to consider whether they would let them into the shop; and if they did let them into the shop, all their powers ended; and that seems not to have been an inconvenient notion, that their admission to the management was to be dependent upon the conduct of the children; but if they were once let into the possession of the concern, the power of the Vakeel was at an end; and the Court of Sudder Adawlut did not see any sufficient reason to differ from the opinion of the Zillah Court, but followed the decree of the Provincial Court in that respect.

If that be the true construction of the will, it becomes a mere question of fact, whether this executor did let the sons into possession of the shop and the management of the concern. There appears on the part of the defendants a certain quantity of proof given of their having continued to act as in the administration of the estate of the testator; that they continued to manage the concern; that they sued for debts and paid debts; that is the positive evidence given by the defendants; and then Hormuzjee is examined by the plaintiff, and gives not very

clear or satisfactory evidence upon that subject. According to the account he gives, he appears to have said that the plaintiff so far continued in the management of the concern that he would not suffer access to the chest except in his presence; and when he is examined as to the part that the defendants took, and whether the plaintiff himself really acted as Vakeel or executor, he answers "No." "You and the plaintiff became Koorshed-jee's Vakeels; did you then pay his debts, recover his claims, and manage his affairs?"—and he says? "No;" and that shews that the sons were permitted by the executor to do it. Then, in another part of the same examination, in answer to a question put by the Court,—“Was the business which Dada Bhacee and Mehrwanjee managed for a period of four years right and proper?”—he cannot deny that they were in the actual management of the business—he gives an evasive answer:—“They do not at present manage business properly.” The result that the Zillah Court came to was that the sons had been admitted completely to the management of the concern; that is one of the grounds they allege for their judgment; and this Court cannot see that the Zillah Court, who were the proper Judges of the matter of fact upon the testimony produced, have come to a wrong conclusion in that respect. On that ground, their Lordships are prepared to advise Her Majesty that the decree of the Zillah Court, and the other decrees that follow it, should be affirmed. This becomes a mere question of fact, whether the Vakeels named in the will, admitting it to have been properly proved, admitted the sons to take the actual management; and on that we are of opinion that permission was given; and if they have once given that permission, their control becomes at an end.

Upon these grounds, their Lordships think the judgment below should be affirmed; but in consequence of the difficulties in the case, and the great obscurity of the will itself, they think the decree should be affirmed without costs.

Decree affirmed without costs.

The 5th December 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and Mr. Justice Erskine.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Judgment for part of claim—Acknowledgment of Defendant.

Eduljee Framjee, Representative of Fyz-oola Khan Azum Khan, deceased,

versus

Abdoola Hajee Qherak.

Where an action is brought for a certain sum, on failure of plaintiff to prove his entire claim, judgment may be given for a smaller amount in accordance with the acknowledgment of the defendant.

Bosanquet, J.—This suit was commenced for the purpose of recovering rupees 3,481. A judgment has been given for a smaller sum. The judgment given by the Zillah Court, which has been subsequently confirmed, was for rupees 2,207, with interest upon it. The plaint begins by saying, “I have claim against Fyz-oola Khan, amounting to rupees 3,481, principal and interest, on an account the particulars of which are written below.” And after stating several circumstances, the particulars are stated below in seven items, amounting to the sum claimed, to rupees 3,481. The whole of that was not proved, and there was a defect of proof of the circumstances that are mentioned in the plaint, but there was proof of the acknowledgment, on the part of the defendant, that a sum amounting to rupees 2,701 was due from the defendant to the plaintiff, pro-

vided the evidence that was given of a paper that was brought to the Moofti, and on which he gave evidence, and of which he said he made a copy, and of which he professed afterwards to produce a copy, was evidence in the case.

Now, with respect to the testimony of the Moofti itself, there does not appear to be any ground for imputing any discredit to it. The only real objection which is now made in this case, is an objection that was not taken at all in any of the Courts below. It was assumed, apparently upon those proceedings, from the beginning to the end, by the parties, and by all the Courts through which this cause has passed, that the paper which is set out in the Appendix is the paper that was spoken to in the evidence of the Moofti, when he stated that the parties came before him, and agreed that a paper should be drawn up, and acknowledged that he has entitled to the amount in question. There is not one word in any one of those petitions of appeal, or any observations of any one of the Judges, that throws any doubt upon the identity of that paper. It does therefore appear to their Lordships, that being the case, it being quite clear that the parties have taken this paper to be the paper spoken to, that we must consider that as the paper which was acted upon in the cause, and which was the paper spoken to by the Moofti in his evidence. Then, if so, that is an acknowledgment that the amount of rupees 2,701 was due by the present appellant, upon which, of course, interest follows. One Judge thought it was necessary that there should be a deed amounting to a compromise for the sum in question, and that being incomplete, it was not able to be supported as such; but the Superior Court appears to have treated it as I think they were bound to treat it, namely, as an acknowledgment by the party who agreed to the contents of that paper, that he did owe the present respondent that amount; and it is a common and ordinary course that an action is brought for a certain sum, and judgment is given for a smaller amount. As this is a case in which the judgment of the Sudder Adawlut must be affirmed, and as this judgment has already been affirmed by two Courts, their Lordships are of opinion that it must be affirmed with costs.

Judgment affirmed with costs.

The 5th December 1837.

Practice of Privy Council—Costs—Appeal—Section 7, Regulation II. 1800 Bombay Code.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Mussumat Keemee Baee,

versus

Luchmun Dass Narrain Dass.

Where a discretion is vested in a Court as to costs, the Privy Council will not allow any appeal against the exercise of that discretion, because no appeal lies against a mere decree as to costs.

But where a Court has no discretion to exercise in the matter (as where a suit was instituted by parties who had no right to institute it, as the person on whose name and on whose behalf they instituted it was dead at the time) costs must follow the decree, according to Section 7, Regulation II. 1800 of the Bombay Code.

The Right Hon'ble T. Erskine.—It will not be necessary to hear the Counsel on the part of the respondents in this case after what has been said with respect to the amount of costs; the main question arises upon the registration of 1800; the IInd Regulation, Section 7, which enacts, "that after the parties in a suit have been heard, and witnesses and exhibits examined and considered, the Judge is to give judgment according to justice and right, and is to order costs to be paid to the party in whose favor the decree should be made." There are subsequent Regulations which are applicable to cases where the parties may elect to proceed in their cause, or where the defendant absconds and does not appear.

In this case, the action was brought by two of the clerks of a person of the name of Permanund-das, for injury supposed to have been sustained to the reputation and the trade of their master by the conduct of the defendant. But it appeared in the course of the cause, that the master had died before this action had been commenced, and therefore, although there appeared to have been some injury sustained by the plaintiffs themselves, inasmuch as they rejected that as the ground of their suit, but rested it entirely upon the right that their master had to recover damages for injury sustained by him; the Court thought that the suit would not be further proceeded in, and proceeded to adjudge the costs of the suit, and then, considering, upon looking into the proceedings, that the defendants had misconducted themselves, instead of following the terms of this Regulation, they proceeded to direct that the defendants should pay their own costs, and the plaintiffs their costs; that is, that each party should pay their own costs.

Now, if there had been a discretion vested in the Zillah Court, their Lordships would not, I think, have allowed an appeal against the exercise of that discretion, because no appeal against a mere decree as to costs would be allowed; but the question here is, whether the Zillah Court had any discretion to exercise or not, and whether they were not bound by the terms of this Regulation. Upon the appeal by one of the defendants against their decision, the Provincial Court and the Sudder Dewanny Adawlut Court were both of opinion that the Zillah Court had no discretion to exercise, and therefore that they ought to have awarded the costs to be paid by the plaintiffs in that suit to both the defendants; but, inasmuch as the appeal there was only by one of the defendants, they could not reverse the sentence against the other defendant who had not appealed, but gave the costs which had been incurred by the appeal to the defendant, to be paid to him by the plaintiff. Their Lordships are of opinion that the judgment of the Provincial and Sudder Dewanny Adawlut Court is correct; that the Zillah Court had no discretion to exercise upon the subject, because the ground of the decision of the Zillah Court appears to have been that this was a suit instituted by parties who had no right to institute it, for the person in whose name and on whose behalf they instituted it was dead at the time, and therefore, having no right to institute it, the judgment was upon the merits, and therefore that the whole case being before them according to this provision in the Regulation, they must give the costs according to the result of the suit.

A case has been cited from Borradaile's Reports, in which the Court appears, in an action under very peculiar circumstances, to have given a most extraordinary decision. First of all, in deciding that the defendants should pay the costs to a plaintiff who did not succeed, and then, when, that failing, plaintiff appealed, in two stages, to other Courts, and failed also in appeal, in giving the costs in like manner against the respondents, who in all three of the proceedings had succeeded. This is rather too strong a case, their Lordships think, to be cited as an authority; and there appears to have been no objection made by the parties, no appeal from the decision of the Court below as to costs, and therefore the point never having been raised, cannot be cited as an authority.

Again, it has been said that there has been a Regulation passed in the year 1827, after the decree in question was made, and that we must look at that Regulation, not merely as declaring what should take place from the year 1827, but as recognizing the practice of the Courts, which is supposed to have prevailed from the time of the passing of the Regulation of 1800 down to that day; but there is nothing in the Regulation of 1827 which is declaratory, or which shows any recognition of any such practice in their form; they are evidently prospective only; and inasmuch as this decree was pronounced before that Regulation was made, we must decide this case without any reference to those provisions. Their Lordships, therefore, are of opinion that the judgment of the Court of Sudder Dewanny Adawlut must be affirmed, as far as the same applies to the appellant's own proportion of

the costs which amount to 1,298 rupees in the Zillah Court, and the whole of the costs in the Courts of Appeal from the Zillah Court.

Mr. Miller.—My Lords, I dare say we shall agree; if your Lordships will permit us, we shall enter into communication with respect to the amount if your Lordships desire to fix them.

Lord Brougham.—There is no difficulty about that; it is 1,298 rupees in the Zillah Court and the costs of the Appeal Courts, and if any costs are to be deducted, they must be refunded, and also there will be the costs of this appeal.

Mr. Miller.—I hope.

The Hon'ble T. Erskine.—The judgment must be affirmed, with costs, of course.

Lord Brougham.—If the respondent have been paid enough to repay it, then he will refund the costs in the Zillah Court which have been improperly paid him.

Mr. Miller.—I hope your Lordships will not decree costs of the appeal against us, because when we come here, we shew that there is an error in the decree of the Court below with respect to these very costs.

Mr. Baron Parke.—That is not the ground upon which you appeal.

The Right Hon'ble T. Erskine.—That appears to have been an evident mistake.

Mr. Serjeant Spankie.—Yes, my Lord:

Lord Brougham.—And if you have been paid enough to repay, you will deduct in order to make repayment.

Mr. Serjeant Spankie.—The 12,000 rupees is carried forward improperly; it is the difference between 1,298 and 4,000 rupees and odd, which we have to repay.

The Right Hon'ble T. Erskine.—The decree will be affirmed as to all the appellant's own costs, the decree being confined to the appellant's own costs.

Mr. Justice Bosanquet.—There is 1,298 rupees in the Zillah Court; all the rest is right.

Mr. Serjeant Spankie.—There is the sum of 4,000 rupees carried forward, and that is carried forward as the sum of 4,000 instead of being 1,298 rupees.

The Right Hon'ble T. Erskine.—Reducing the costs in the Zillah Court to 1,298 rupees.

Mr. Serjeant Spankie.—The respondent to be entitled to any costs subsequent to that period, including the costs of this appeal. That is the substance of it.

The 7th December 1837.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir J. Nicholl, Mr. Justice Erskine, and Sir E. Hyde East.

Sale of Mogulan Dues (by Mahomedan Widow)

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Bomanjee Muncherjee,

versus

Syud Hossain Abdoolah.

A sale of Mogulan dues by a Mahomedan widow annulled as made without proof of power to sell.

Lord Brougham.—THIS suit was brought by a party whose title, if it cannot be displaced by the title assumed to be given to the purchaser, stands unimpeached and admitted, but the suit is for the purpose of setting aside that title, which was given, or pretended to be given, by the Headji Begum to the purchaser, the then defendant, that is, the defendant below in the first instance before the Native Court; and the appellant here originally brought the suit for only 227 rupees, for the one year's income of the moghulall dues; it afterwards, by an order

allowing a supplemental petition to be presented, became a suit for the purpose of disposing of the whole question as to the right to sell, that is, as to the title obtained by the purchaser, and the validity of the sale so pretended to be made by the Headji Begum to the appellant; we are therefore now assuming—(and the parties will attend to this for a moment to see whether there is any mistake in our assumption)—we are assuming that this decree below, reversing the judgment of the Zillah Court, which judgment reversed the judgment of the Court of the first instance, in which the decree had originally been given against the sale, and for the present respondent, that the decree of the Zillah Court disposes not merely of the question which was first brought before the Court of the first instance, touching the one year's income of the mogulan dues, but that it disposes of the other question, of the validity of the sale, as well as the right to those 227 rupees for the one year's dues; we are assuming it disposes of that question by the decree, containing a declaration that the Hdaaji Begum had no power to sell, and further, annulling the sale contended for below.

Mr. Lloyd.—It leaves that open.

Lord Brougham.—The stamp having been increased from 40 rupees, which would have been sufficient, had the amount sought to be recovered been the value of one year's income to 100 rupees, the amount required, if it had been the 10 years' income calculated in order to protect the revenue, in case of the whole value of the estate being in suit, and not the year's dues, we assume that—

Mr. Lewis.—We assume that to be the case.

Mr. Lloyd.—It leaves the question open as against the widow.

Lord Brougham.—It leaves the question open, in what way one does not exactly see, except that not having covenanted for title, yet nevertheless it is understood; it seems to be taken for granted that the purchaser who has obtained a bad title has a right to sue her at law for damages for having conveyed that bad title, or for recovering the purchase-money; we are assuming that—

Mr. Serjeant Spankie.—All those questions have been reserved.

Lord Brougham.—We have considered this case very minutely during the long and most able argument on both sides, and (so far as an argument can be satisfactory upon questions involving great difficulty) the very satisfactory argument on both sides; we have also considered the matter since the close of that argument, and we are of opinion that, though the case on neither side is free from doubt, and though it is very probable the evidence produced on both side is not entitled to entire credit, and though there appears certainly to be the production of one document, respecting the authenticity of which there is much doubt upon the minds of the Court, I mean the copy of the power of attorney in page 9, produced by the present respondent, the plaintiff below, nevertheless we do not see sufficient grounds for reversing the decision come to in the first instance by the Native Commissioner's Court, declaring that the Headji Begum was not armed with sufficient power to deal with this property by way of sale after the death of her husband, and that the sale must be annulled which she assumed to make.

It is unnecessary to go into the particulars of this case further than to state that such is our opinion that we cannot, under these circumstances, reverse the decree of the Sudder Adawlut Court; and upon the whole of the case, we think the judgment come to by that Court, reversing the decree of the Zillah Court, must be affirmed, and the consequence will be that the sale will be annulled. The only observation arising upon that decree is, that there is a certain inaccuracy of expression in the reason assigned for the reversal, which is stated to be not the want of power by the Hedji Begum to make the sale, not the non-existence *de facto* of a sufficient power of attorney to enable her to sell the absent brother's property, the share of the moghulall dues, but the non-production of that power of attorney; that is inaccurately stated. It is not the non-production of the power that is the ground of the decision against the validity of the sale, or against the

Headji Begum's power to make that sale, but it is the non-production of that power or of any circumstances proved which might have enabled the Court to presume the existence of that power. It follows that the Zillah Court was not right in the second instance in holding that the Headji Begum had that power, and obliges the Court of the last resort, the Sudder Adawlut Court, to decree that she, not having that power, had sold property she had no right to convey, and, therefore, annulled the same; therefore the decree must be affirmed, and the decree having given the plaintiff below, the present respondent, his costs in all the three stages, that is, affirmed like the rest, and is parcel of this affirmance; but under the circumstances of the case, and with reference to the conduct of the parties, we are not of opinion that the respondent should have his costs of this appeal; we think it quite right that he should have his costs in all the stages below, and, among other reasons, for this, that before the Native Commissioner, after the point had been made and stated by the Court, and distinctly brought to the knowledge of the present appellant's vakeel, that the production of the power of attorney under which the sale was made, or assumed to be made was necessary for this case; that time after time the Court of the first instance adjourned first for seven days, then for three days, and then for two days; in addition to those, twenty days' time was afforded for the production of that instrument, and not only was it not produced, which might be because he had not got it to produce, but that no statement was ever made by him (when thus pressed by the Court so frequently) of the fact which he now asserts, that he had not got it, until on the 27th of July, two days after the 25th (upon which 25th it is to be observed Headji Begum's evidence had been open to the Court), notice was given that she was entitled to be examined, and an order for her examination, she being a Mahomedan woman, at her own residence, having been obtained, then, and then only, it was that the vakeel of the present appellant for the first time stated that he had not got possession of that instrument, which of itself would justify the Court below in our opinion in giving the costs of all those proceedings; but when we take into consideration the conduct, in other respects, of the respondent, particularly with respect to the production of that instrument, the alleged copy of which is in page 9, we are of opinion he is not entitled to his costs of this appeal.

Judgment of the Sudder Adawlut Court confirmed.

The 9th December 1837.

Present:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Mr. Justice Erskine, and Sir E. Hyde East.

Agreement (kararnamah)—Payment of Government Revenue—Conditional sale—Mortgage.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sri Rajah Kakerlapoody Jagganadha Raj Bahadoor,

versus

Sri Rajah Vutsavoy Jagganadha Jaggaputty Raj Bahadoor.

The appellant became security for the payment by the respondent of the Government dues in respect of a mootah then about to be sold for those dues; and by the first *kararnamah* entered into by the parties it was stipulated that, on default of the respondent to pay any part of the instalments, the appellant was to obtain a transfer of the property and to retain it after returning to the respondent the money which may have been paid by him. By a second *kararnamah* entered into on the same day, the plan of a conditional sale provided by the first *kararnamah* was reduced to a mortgage with a covenant between the parties that, whenever the appellant should take possession of the mootah for the purpose of enabling him to discharge the amount for which he became security, he should restore the mootah to the respondent as soon as he was re-imbursed all that he had advanced, out of the rents and profits of the mootah. *HELD* that there was no such inconsistency between the two instruments as to make the second an invalid instrument.

Bosanquet, J.—THEIR Lordships are of opinion in this case, that the decree of the Court of Sudder Dewanny Adawlut ought to be affirmed. The facts of the case

are very few. It appears that the respondent, being in possession of a mootah upon which certain dues were owing to the Government, the land was advertised for sale by the authority of the Collector. The appellant, either for the purpose of purchasing, as it is suggested, or for some other reason, was present, together with the respondent, at the time when this property was about to be sold, and on the application of the respondent, he was induced to give a security for the payment of the duties due to the Government, amounting to about 29,000 rupees, and to take a security for the repayment of that as well as the repayment of the sum of 2,000 rupees, which the respondent owed to another person, and which he agreed to advance, and that he advanced 1,000, and I think the other 1,000 of that was not advanced; but that is completely immaterial in the present case. On this communication there were certain instruments executed, of which there is no doubt there was a pottah executed and an *arzee*, which were necessary for the purpose of authorizing the Collector to make a transfer of this property to the appellant, who had entered into this security. These instruments are, upon the face of them, such as to authorize the Collector at once to make a transfer of the property; but as it was meant as a security to a certain extent, and no further, he entered into the first *kararnamah*, by which it is stipulated, "that if the respondent should not pay the instalments fully, and any part of them should be in arrear, the zemindary is to be continued under the appellant consistently with the writing aforesaid, and that he is only to return to the respondent the rupees which may have been paid by him." This is very positive, undoubtedly. The pottah and *arzee* were deposited with a third person, who was not to give them up to the appellant for the purpose of enabling him to obtain the transfer of the property until there should be a default made according to this agreement. A default was undoubtedly made, the respondent did not pay the whole he had engaged to pay, and a default having been made, and the appellant having been called upon to pay the money, they were given up and carried to the Collector, and the transfer was made.

Upon the face of this, the appellant was entitled to retain the property. The value of the property appears, upon the various statements made in the course of this case, to be of a very large amount in proportion to the sum agreed to be advanced; what the precise amount of it may be is not very material to this transaction, supposing the advance agreed to be made to be very greatly disproportionate to the real value of the property. I will come presently to what it appears to have been; but admitting this to be a very hard and very oppressive bargain, if nothing else was done, the party in whose favor it was made would be entitled to take advantage of it; but one fact which is stated by the respondent, denied by the appellant, and insisted upon in that reply, is, that on the same day another instrument was entered into, by which this plan of a conditional sale, entitling the appellant to retain the property, provided no default was made, was in fact, reduced to a mortgage with a covenant between the appellant and the respondent, that whenever he should take possession of this mootah for the purpose of enabling him to discharge the amount for which he became security, when he should have received out of the rents and profits of that mootah the sum he had paid, with all expenses, he should restore the mootah to the respondent.

Now, then, we must remember who the respondent and appellant were respectively. The appellant was the uncle of the respondent by blood, and also related to him by marriage. The account which is given of the transaction by one of the witnesses who comes to prove the actual execution of the second instrument, the *kararnamah*, states, if he be worthy of credit, that which passed upon the occasion, for having stated that he himself was the writer of this instrument, and having stated who were the witnesses to that instrument, and those witnesses are called on the first occasion before the Provincial Court, he not only states that he wrote it, and those persons attested it, but he states this: "After the passing of the *kararnamah*, I asked the defendant what advantage there was for him by his taking the trouble

"of writing the zamin?" He answered me thus: "He is the real son of the elder-sister of my mother, and Jagganadha Raj, who is my protector, has, for the accomplishment of his, the plaintiff's business, incurred expenses and trouble, and afforded him assistance whereby he obtained a great reputation, and it would tend to my honour, if I, although I may suffer great trouble, pay five or six thousand rupees, and preserve the mootah for him (the plaintiff); and I have at present caused the pottah and *arzee* to be written and taken, merely in order to be sure; and as soon as the money due to me is paid I will give back his mootah to him." If that account is true, if this witness is to be believed, that explains the object for which this kararnamah was given; and if this second kararnamah was given, there can be no question that it was an agreement between these parties, which the respondent was as much entitled to take advantage of as the appellant is entitled to take advantage of the first kararnamah, supposing a second executed.

The case was brought in the first instance before the Provincial Court, and both these documents were filed. The first kararnamah, together with the *arzee* and the pottah were filed, and no objection was made to them; consequently, they are to be taken as correct. The question, then is whether there has been anything to take off the effect of this first kararnamah, given on behalf of the appellant; witnesses were called for the purpose of proving this second kararnamah, the regular ordinary witnesses; that is to say the person who actually wrote it, gives the account of it, and the attesting witness. The Judge of the Provincial Court did not think it necessary to call for further witnesses, for he was of opinion,—and he so states in his judgment,—that if the first instrument was a good and valid instrument, it follows as a necessary consequence, that whatever transactions may have subsequently occurred, it *bond fide* became the property and the right of the defendant. He did not enter into any question whether there was evidence of that second instrument, and it appears that subsequently he admitted to the appellant that it was unnecessary for him to call witnesses to rebut the evidence given on the part of the respondent.

In that state of things the respondent appeals to the Sudder Dewanny Adawlut; and that Court having heard the case argued upon the evidence, the decree was, as appears to their Lordships, very properly reversed, because they were of opinion, and their Lordships are also of opinion, that if that second kararnamah was executed, of which the evidence was plain before the Provincial Court, and was not opposed, that was sufficient to entitle the respondent to possession, in consequence of the whole advances having been discharged out of the profits of the mootah. It is material to observe here that, in giving their judgment upon that occasion, they stated the value of this mootah, with all the particulars, and how much had been received from it during the time, so as completely to apprise the respondent of the circumstance of the beneficial property being much greater than the amount of the security which had been given on the part of the appellant; and then it being represented to them that the witnesses had been stopped on the part of the appellant, the reply of the Court was, that it was perfectly open to the appellant to controvert any view taken of the value of this property, supposing the value to be an important feature of the case; but the view taken by the Provincial Court was that the first instrument being executed whatever might have taken place afterwards, that instrument entitled the appellant to treat this as a sale, and to hold it; it is also to be observed that, in a very early stage of these proceedings, certainly in the reply of the respondent, it was stated that this mootah, which was given as a security for the advance of a sum of about 31,000 rupees, was worth a lac of rupees, so that the attention of the party had been completely called to that; but he called no witnesses to disprove it; he not only called no witnesses, but he does not appear, from the beginning to the end, to have called that fact at all in question. In the final decree of the Court of Sudder Dewanny Adawlut, they state that in detail. In his petition of appeal he never calls that in question, and the objection is now

started for the first time, that that representation is not to be relied upon. Their Lordships cannot but think that this fact appearing upon these proceedings, taking into consideration the conduct of all the parties in this suit, that a mootah of the value stated in these proceedings was professed to be sold by the first kararnamah for about one year and ten months' purchase, which certainly is a very inadequate price ; that is an important feature in the case.

Then, upon the reply, evidence being adduced for the purpose of impeaching the testimony of those who set up the second kararnamah, which is undoubtedly *prima facie* legal evidence of the execution of that instrument, evidence is called on the other side to support it upon the testimony of those respective witnesses. If the case turned entirely upon this, there might be some difficulty in saying whereabouts possibly the balance of credit was due ; but there is a circumstance then introduced into the case in the first instance, namely, another instrument, which is adduced for the purpose of rebutting the evidence offered on the part of the respondent, of the execution of that kararnamah ; and that transaction if it really took place, would certainly go very far, if not conclusively, to show that there was a fabrication. I speak here of the receipt by which it is asserted that 14,000 rupees, which had been paid by the respondent, and the payment of which 14,000 rupees by him appears to be corroborated by other witnesses on the respondent's side, was actually repaid by the appellant to the respondent, and an instrument upon that occasion taken, in which it is stated, after setting out the whole of the transaction : " I therefore demanded from you the payment of that sum, which you have this day paid to me in ready cash ; the price of the cottam-mootah has therefore been discharged in full ; I will never make any kind of demand. This receipt has been written and given with my consent." This receipt is said to have been given on the 18th of February 1823. It is evident from the proceedings that the date of 1823 is a mistake ; the original transaction took place the 28th of July 1812, and it appears by a document which has been given in evidence, that, in February 1813,—the very day in February, I think, does not appear,—but by a document filed, and which was read on the part of the respondent, it appears that, in that very month of February 1813, an application was made to the Collector by the respondent, requesting him to stay his hand, and not to allow the transfer of this property, as being contrary to good faith, and making an objection to the transfer. It is supposed that, notwithstanding he was then protesting against the transfer of this property, he did, in this very month of February 1813, execute this receipt, in which he states the whole transaction, stating himself completely out of Court, and that he had received payment of the whole sum he himself had advanced, and that he never could make any kind of demand.

In order to prove this instrument, witnesses were called, and, among others, a witness was called who was the attesting witness, and which witness, when called upon, could not even tell the particulars of the letters of his own signature, or of the signature of the person who signed it. In respect of not being able to read the letters of the signature of another, that might very possibly be ; he might write a very bad hand ; but that he could not tell the letters of his own signature appears very improbable. There are witnesses called on the part of the respondent to contradict the circumstance of that 14,000 rupees ever having been repaid from acknowledgments on the part of the appellant. On the other hand, evidence is called by the appellant for the purpose of proving that they were paid. The Court of Sudder Dewanny Adawlut were clearly of opinion that that instrument was a fabrication, and their Lordships certainly concur in that opinion. That being the case, it is a very important circumstance that the main feature of the appellant's case, which was brought forward for the first time, after the case had been sent for review, for the purpose of rebutting the evidence of this second kararnamah, not only falls to the ground, but falls to the ground

because it is a fabricated instrument, set up on the part of the appellant, and that has certainly the effect of cutting down to a great extent the attempt on the part of the appellant to rebut the evidence which, it must be always recollected, is *prima facie* legal evidence of that instrument.

Putting that instrument out of view,—recollecting that the instrument never had been adverted to in the early part of the proceedings,—that it might naturally be expected when the second document was set up on the part of the respondent,—that the appellant should come and assert another document, the conclusive answer to that is, that nothing of that kind is brought forward till the case is sent for review. It is in contradiction also, as I noticed, to the judgment of the Court of Sudder Adawlut. The appellant insisted that he had paid the whole money to the Collector, whereas now he admits that it was paid by the respondent, but then he asserts that he repaid it to him.

Putting that out of the case, then we have now to consider whether there is a probability of this second kararnamah having been executed, or whether it is so improbable that it should have been executed, there being *prima facie* legal proof of it, that their Lordships ought to hold, contrary to the opinion of the Court of Sudder Dewanny Adawlut, that the instrument is not available. There are two circumstances with respect to probability and improbability. The improbability on the one side is said to be this: that this was not an absolute but a conditional sale in the first instance; if it was a conditional sale, which condition is recited in the first kararnamah, why was not the additional condition by which it was to be held as a mortgage also inserted in the same instrument? Undoubtedly, that is a circumstance which at first strikes one as very improbable, and has great weight with their Lordships in the consideration of this question. But though it is improbable, and appears to be so to their Lordships, it is by no means an impossibility, as I think one can conceive circumstances in the case which were not unlikely to produce that, and that I find noticed in the judgment of the Court of Sudder Dewanny Adawlut. It must never be forgotten that this is a transaction between near relations, that the object of the respondent was to prevent this, which appears to have been his paternal inheritance, from being disposed of to strangers by a public sale, and he persuades his uncle to become a security for him; his uncle requires security that he shall not be called upon to pay money without the power of reimbursement, and he takes a security which enables him to take possession of the property, provided the instalments shall not be duly paid and punctually paid to the amount of the smallest sum, by his nephew, on behalf of whom he makes this advance. Then an instrument is executed to that effect, but it is stated by the witness Coondoor, to whose evidence I have already referred, that the uncle promised to his nephew that, though he took possession of his property, if he should be repaid out of the rents and profits, he would give him back his estate. There is nothing very improbable in the uncle having made that promise to his nephew, and if he did make that promise, binding upon him as a private agreement, it is not improbable that he should put into writing. It is an agreement that would not affect any other person to whom the uncle should transfer the property which he had acquired, but it is an agreement by which, as long as he held the property, he would be bound; and the Court of Sudder Dewanny Adawlut took notice in their judgment that an instrument might have been executed in the common form, which I think they say probably the first kararnamah was, notwithstanding the subsequent instrument. There is some expression of that kind which leads one to infer, and indeed that is a necessary inference from the proceedings, that the Sudder Dewanny Adawlut, constituting the Judges on the spot, saw nothing in the nature of this transaction so improbable as to induce them to believe it could not have taken place.

It is further to be observed, with respect to the witnesses by whom the facts are proved, that we have not the benefit in the same manner that the Court before

whom the question was brought in the first instance had of seeing the witnesses, and the opinion of the Court was given, not merely upon the fact of the execution of that kararnamah, but taking it to be executed, and connecting that fact with the testimony which had been given.

Such being the circumstances of improbability which had their full weight with the Court, though I do not think them unanswerable, then comes the circumstance of probability on the other side, namely, the value of the property. Is it at all probable that this property should have been sold and sold out and out, for less, as it appears to their Lordships upon these proceedings, than two years' value? But supposing it was even three years' value, or even four years' value, would it not have been extremely improbable that an instrument should have been executed by the nephew to his uncle, transferring it to him out and out, provided he was in arrear in the payment of his instalment to the amount of a single rupee? It is so improbable a transaction, one should be very much inclined to suppose that, though this instrument was executed for the purpose of enabling the appellant, the uncle, to have that kind of possession of the property, yet there should be some private understanding or some promise that when he should be reimbursed, or if he should pay to a larger amount, or something of that kind, he would restore to him his paternal property. That is probable, and, that being probable, it returns to what I observed before; it being highly probable such a promise should be made, is it not highly probable that that promise should be put into writing?

Under these circumstances, their Lordships are of opinion that the conclusion to which the Court of Sudder Dewanny Adawlut came is correct; that the receipt set up for the purpose of rebutting the second kararnamah is a fabrication; that the second kararnamah has been executed, and that, consequently, effect is to be given to that kararnamah. The receipt being clearly a fabrication, that impeaches the testimony brought forward, to a certain extent, by the person who sets it up, who is the appellant, when he brings forward testimony for the purpose of impeaching the credit of the witnesses to the second kararnamah, who state circumstances which are *prima facie* legal evidence of the actual making of the instrument by the person who wrote it. The Court of Sudder Dewanny Adawlut must be the best judges of instruments of this description; and their Lordships are of opinion that there is no such inconsistency between those two instruments as to make the second an invalid instrument; but treating it, therefore, as an agreement between the parties, notwithstanding the first instrument may have been deposited, the effect of the transaction is that, if the appellant should be reimbursed all which he has advanced out of the rents and profits, he will restore the estate to his nephew. Then, if he is to restore the estate to his nephew, he must not only restore the estate, but what he has been overpaid; and it does not appear to their Lordships there is any such apparent objection to the amount they have awarded (I think 9,000 rupees is the sum he has been overpaid) as to furnish an objection, and that objection does not appear to have been taken in any of the proceedings on the petition of appeal. Their Lordships under these circumstances are of opinion that the decree of the Court of Sudder Dewanny Adawlut must be affirmed and affirmed with costs.

Decree affirmed with costs.

The 11th December 1837.

Present :

Hereditary offices—Enam Grants—Limitation.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Beema Shunkur, Bal-Crishna, and Venaik, sons of Gungadhara Sastri,

versus

Jamas-jee Shapor-jee and others.

The grant of a village in Enam by the Government cannot deprive the Meymoodars of their hereditary rights. To entitle the person in possession to the enjoyment of the office and receipt of the dues from the

village, it is not essential that the duties of the Office should have been actually performed, if the party was prepared to discharge them when required. Claims to recover arrears of such dues are limited by Section 4 Regulation V. 1827 of the Bombay Code to 12 years.

Erskine, J.—IN this case Jamas-jee Shapor-jee and Ramvalub Jenan Ram, two of the present respondents together with Toolee Ram, Muja Ram, and Rustom-jee Rutton-jee whose interests are represented by the other two respondents, on the 17th of September 1827, commenced a suit in the Court of the Assistant Judge in the zillah of Surat, against the present appellants for the recovery of the sum of Rs. 1,344, being the amount of the arrears of certain hereditary rights of office alleged to be due to the plaintiffs from the appellants. The plaintiffs' suit was founded upon the allegation that they were the hereditary Meymoodars, Parek, and Mehtahs of the Chowrassee pergunnah, and that the owner of the village Dindolee, which was situate within the pergunnah, were bound to pay to the hereditary Meymoodars the annual sum of Rs. 56; that the village of Dindolee had, in the year 1803, been granted by the Governor in Council to Gungadhara Sastri, the deceased father of the present appellants, who succeeded to the village as his heirs; and that neither the father nor the appellants had paid any part of the hereditary dues, the value of which the plaintiffs claimed in that suit. The defence set up by the appellants was in substance, *first*, a denial of the plaintiffs' title to the hereditary offices claimed by them; *secondly*, a claim of exemption from the payment of the accustomed dues, by virtue of the grant of the village by the Company to the father of the appellants in Enam; *thirdly*, a denial of the right of the plaintiffs to recover any of the alleged arrears, on the ground of their never having performed the duties of their several offices in respect of the village of Dindolee since the date of the grant, and that the appellants and their father had in consequence employed and paid others to transact those duties; *fourthly*, a denial of the plaintiffs' right to recover under the Regulations of 1827, Regulation V. cap. I. The plaintiffs supported their claim by several documents filed as evidence in the suit, and by the testimony of several witnesses examined in their behalf. The defendants produced no evidence. The Assistant Judge on the 11th September 1828, pronounced his judgment, and thereby decreed that defendants should pay plaintiffs Rs. 1,344, as the dues of the Meymoodars and others for twenty-four years, at Rs. 56-1 per annum and costs. From this decree the appellants appealed to the Zillah Courts of Surat upon the grounds already enumerated, as their defence before the Assistant Judge.

In this stage of the cause, the grant of Dindolee in Enam to the appellants' father which had not been given in evidence before the Assistant Judge, was produced by the Collector of Surat, which, however, is wholly silent on the subject of the dues in question; and the following answers to questions put by the Court to the Collector were returned and read. The first question put by the Court was, "When Government give a town in jaghire, do the Jaghiredars pay the Meymoodars, and other officers their rights of office, or do they cease from the time the town is given in jaghire?" The answers were, "Either the Honourable Company or the Guicowar give villages in jaghire; the Jaghiredars must pay the hereditary Meymoodars, Pareks, and Mehtahs their yearly dues; no hereditary office ceases on a village being given in jaghire, but continues as heretofore." The second question was, "If the Meymoodars, Pareks, and Mehtahs do not go to Jaghiredars' villages to perform the duties of their offices, do they then receive their fees of office, or not?" And the answer returned was, "The Meymoodars, Pareks, and Mehtahs do perform their duties, but transact all business that comes before them in the office at the head station, and there receive the fees of office." In addition to this, the depositions of two hereditary zulatee or accountants were cited, who proved that it was customary for the owners of land given in jaghire to pay the customary dues to the hereditary Meymoodars, Pareks, and Mehtahs, even where no duties were performed.

On the 19th of November, 1829, the Zillah Court pronounced its decree which concludes thus: "It is now here proved that the Meymoodars' rights are hereditary,

but it is well known that the children receive these rights from their father, and that the person doing the duties receives the fees; and if Government give a village in jaghire, the Meymoodars' rights over it do not lapse; and it is proved beyond all doubt that plaintiffs are the Meymoodars and Mehtahs of these villages, and if they had performed the duties of their office, their claims would have been proved against defendants; but it is clearly proved that plaintiffs have not performed the duties of this office for twenty-four years, nor received their dues, which therefore do not accrue to them for that period. Therefore, after mature deliberation, the Senior Assistant Judge's decree is reversed, and the plaintiffs' claim thrown out; but the plaintiffs' rights as Meymoodars and Mehtahs are decreed to them, and that defendants should in future employ plaintiffs in those duties, and pay them their dues, and if they should not call upon them to perform the duties, nor shew good reason why they should not employ them, they shall nevertheless pay them their fees, plaintiffs paying costs in both Courts."

Against this decree the present respondents appealed to the Sudder Dewanny Adawlut at Bombay, and the cause came on to be heard on the evidence produced in the Courts below on the 15th December 1831. The sitting Puisne Judge gave his opinion to the following effect: "The trying authority is for confirming the decision of the Senior Assistant Judge, and awarding to the appellants the amount sued for; but as the correctness of this opinion may be questioned in reference to the law of limitation, the case is referred to a full Court, for the adoption of such mode of disposal as the Judges may consider most expedient." And on the 16th May 1832 the four Judges pronounced the decree of the Court, *viz.* "The parties being this day present in Court by their vakeels, and all the papers and proceedings filed in the suit having been read, and mature deliberation had thereon, the Court is of opinion that the appellants are entitled to recover fees for the last twelve years, and therefore determines to amend the Judge's decree of 19th November 1829 to that extent; costs to be borne in proportion to the sum awarded."

From this decree the present appeal was presented to His late Majesty in Council, and has been referred by Her present Majesty to the Lords of the Judicial Committee, and was argued before them on Saturday last. When these points were insisted upon by the learned Council for the appellants: *first*, that the plaintiffs' witnesses had not made out any title to the fees claimed; *secondly*, that the respondents were not entitled to recover anything, on the ground that they had not performed any of the duties in respect of which the fees were payable; and *thirdly*, that their claim was barred by the 5th Bombay Regulation of 1827, chapter 1, or that at all events it should be reduced to the amount of six years' arrears under the 3rd Section of that chapter. On the other hand, the respondents insisted that they had clearly made out their claim, and that the Sudder Adawlut, so far from having awarded them more than they were entitled to recover, ought to have confirmed the sentence of the Assistant Judge of the Zillah Court, and decreed them the arrears of the whole twenty-four years, for that neither the 3rd nor the 4th Sections of the Regulation relied on applied to their case.

Their Lordships disposed of the first point during the argument, being satisfied that, although the evidence of the enjoyment of the office was slight, there was nevertheless sufficient to shew the respondents' title to it, and receipt of the dues from the village of Dindolee before and down to the grant of that village to the appellants' father in 1803; and there being no evidence on the other side, which the appellants might easily have produced if those fees had been paid to any other party, their Lordships also intimated their opinion that the grant of the village in Enam by the Company could not deprive the Meymoodars of their hereditary rights, and, agreeing with the Courts below, that it was not essential to the respondent's case that the duties should have been actually performed if the respondents were prepared to discharge them when required, and seeing no reason to doubt the conclusion formed by the Zillah Court, that respondents attended at their office according to the ordinary

course of practice in such cases. Their Lordships confined the argument of the learned Counsel for the respondents to the questions arising out of the Bombay Regulations, and, after hearing the Counsel on both sides, took time to consider their true bearing and effect upon the case before them.

Their Lordships have now fully considered these Regulations, and are of opinion that the decree of the Sudder Adawlut is right and ought to be affirmed. They cannot, however, adopt the view taken by the learned Counsel for the respondents, that the claim of their client ought to have been extended beyond the twelve years by virtue of the provisions of the 1st Section. For their Lordships think that that Section is in no way applicable to the present proceeding. The object of that Section appears to have been to prevent the title of the actual possessor of any lands, houses, hereditary offices, or other immoveable property, from being questioned after an uninterrupted possession as proprietor for more than thirty years; and if the appellant had been able to shew that some persons other than the plaintiffs had been for more than thirty years in the possession of the office of moojomoodan for this pergunnah, the title of the possessor might have been set up by the appellants in answer to the respondent's claim, otherwise they would have been liable to a double payment. The question then is, whether this case falls within the 3rd or 4th Section, for the 2nd Section refers to suits for damages, for injuries to the person, and for the recovery of privileges of caste, and therefore is obviously wholly inapplicable. The 4th Section declares that in all suits not falling under any of the limitations in the preceding Sections of that Chapter, it shall be a sufficient defence that the cause of action arose more than twelve years before the suit was filed.

Unless, therefore, the appellants can bring the case within the provision of the 3rd Section, the Sudder Adawlut has rightly decreed to the respondents the amount of the arrears for the last twelve years.

This Section provides that in all Civil suits for debts not founded upon, or supported by, an acknowledgment in writing, and in all suits for damages other than those specified in the preceding Section, it shall be a sufficient defence that the cause of action arose more than six years before the suit was filed.

The question is, whether this is a suit for debt or damages within the meaning of this Section, for if it be either the one or the other, as it clearly does not fall within any of the exceptions, the amount to be recovered must be reduced to the arrears for the last six years. In order to decide the question, it is necessary to bear in mind the foundation of the respondent's claim; it does not rest upon any contract, expressed or implied, made by the sovereign proprietor of the territory, of which a part has since been given to the appellants, by which the possessors of land within that territory are bound to contribute in certain proportions to the maintenance of certain hereditary officers created by the grant, imposing an obligation on the officers to perform certain duties when required, and an obligation on each landowner to pay an annual stipend for the maintenance of the officer.

The question is not whether such an obligation might be enforced by a suit in the nature of an action of debt, but whether a claim so constituted is a debt within the purview of this Regulation, and their Lordships are of opinion that it is not. They consider the debt pointed to by this Section as confined to demands founded upon the contract of the parties, for the terms of which the Government in India, justly though it unsafe to rely upon the fading memory of witnesses beyond the period of six years; neither can this be looked upon as a suit for damages within the meaning of the Regulations. For the respondents are not suing for damages sustained by them, in consequence of any tortious interference with their hereditary rights, or for any breach of contract by the appellants, but seek in this suit to recover the payment of the specific sums granted to them, in respect of the lands occupied by the appellants; and their Lordships are of opinion that the Judges of the Sudder Adawlut were right in applying the fourth Section of the Regulations to this case, and will advise Her Majesty to affirm their decree and to dismiss this appeal with costs.

The 30th November 1838.

Present :

Lord Brougham, Mr. Baron Parke, Sir T. Erskine, Sir H. Jenner, Sir S. Lushington,
and Sir E. Hyde East.

Mortgage—Equitable Mortgagee.

Pandoorung Bullal Pundit,

versus

Balkrishen Hurbajee Mahajun.

To entitle a person to claim as equitable mortgagee, it is not sufficient to show that he paid off the original mortgage, but also that it was his own money that was paid, and that he was to stand in the position of the original mortgagee.

Mr. Miller and *Mr. Wigram* having been heard for the appellant.

Mr. Serjeant Spankie rose to address their Lordships.

Mr. Baron Parke.—You need not trouble yourself; none of their Lordships have any doubt about the propriety of the decree of the Sudder Dewanny.

In this case the appellant shapes his case as equitable mortgagee from Khataykur.

He says he has paid off the mortgage at their request, and he was to stand in the position of the mortgagee, as if a real mortgage had been made to him. He has given proof, sufficient perhaps, that he was the hand that paid off the money under the original mortgage; but that it was his own money, or that he was to stand in the situation of the original mortgagee, he has not made out. It depends upon the letter No. 8; he says it is a genuine letter; that fact is not proved; there is no proof brought forward in favour of it, and his own conduct affords a strong argument against him. He made originally a very different case, and never said a word about this mortgage for above a year; there is no proof of that document upon which he now relies.

Lord Brougham.—The proof of that letter was a most material point in the case. It was, as Dr. Lushington said, very early made the subject of dispute by the party against whom the claim was made; and whatever may be said as to the informality of these proceedings, you are not to make the want of form on the one side supply the defects on the other side, or make the mere statement, that he was ready to move, be taken as proof that he did make the motion.

The appeal will be dismissed without costs.

The 30th November 1838.

Mesne Profits.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Sooriah Row,

versus

Rajah Encoogunty Sooriah.

Decree of Sudder Court estimating the amount of mesne profits from the average of two preceding years, as ascertained in a former suit (the evidence in the present suit being unsatisfactory on both sides) upheld.

Erskine, J.—It is not necessary in this case to enter into a consideration of those circumstances which led to the present action, because the whole issue between the parties was, by the conduct of the Court itself, and by the assent of the parties, reduced to this simple question: "The only point to be proved in this case is the precise amount of the net profits of the village of Gorasa in the years Swabhanoo and Tarana." By this their Lordships understand the Court to state that the only question for the parties to direct their proof to was, what was the real value of the property during those two years? or, in other words, what was the amount which

the plaintiff had lost in consequence of his not having been in possession of that property to the possession of which he was entitled?

The Court before whom this plaint was first brought was so dissatisfied with the evidence on both sides, that it took the extraordinary course of dismissing the suit altogether, making the plaintiff pay the costs.

Now, it was obvious, from the evidence before the Court, that the plaintiff was entitled to something, and the Court ought to have ascertained, in the best manner it could, what that something was; it ought not to have made the plaintiff pay the costs when he was entitled to something; but, upon the appeal, the Court of Sudder Adawlut seems to have been dissatisfied with the great mass of evidence given on both sides, and they, therefore, agreeing with the Provincial Court that the evidence was altogether unsatisfactory, and not to be depended upon as to the actual produce, proceed to say,—“What the value of those profits may be, the documents and witnesses in this case will not prove, but it need only be observed that the defendant himself rated the produce of this very village in his suit No. 2 of 1820, in the Provincial Court for the Northern Division, at Rs. 8,132-2 for two years; and the Northern Provincial Court, in their decree in that suit, awarded in his favor Rs. 4,111-11-2, as the value of the profits of the year Pramadi; and according to the plaint, Rs. 8,342-13-7 had been paid to the plaintiff on account of the profits of the two years, Vishoo 1821-2 and Chitrabhanoo 1822-3, up to the date of the decree of the Sudder Adawlut in the appeal suit before alluded to. It may, therefore, very fairly be inferred that the sum claimed by the appellant as the value of the mesne profits of one year, *viz.* Rs. 4,121-6-9, is not considerably over-rated, if it be over-rated at all.” And then they proceed to adjudge to the plaintiff something less than would be due upon that calculation, after deducting from that amount 1,000 rupees, received by the plaintiff himself. It is impossible for the Court to say that the fact of the defendant himself, or of those under whom the present appellant claims,—that the defendant himself in that suit having claimed the sum of 8,000 rupees for two years before, and received half of it for one year’s profit, and there having been double that sum paid into Court for two years’ profit,—that those facts did not amount to evidence to guide the Court, and to satisfy them that it was a fair average value, because those years in respect of which that account was taken, were the years immediately preceding 1823 and 1824, the profits of which were under discussion. Without saying what the value of the evidence would have been if there had been any contradictory evidence, or if there had been any circumstances to shew that the value of those years was less than that of the preceeding years, or any other circumstances, still it is enough to say that it was evidence upon which the Court might, in the absence of any other proof, found its judgment; and that it was a fair calculation of the profits of the years 1823 and 1824. The Court has discarded altogether the evidence of the defendant as well as the other evidence of the plaintiff. And if their Lordships, upon looking at the evidence for the defendant, could see that it placed within the reach any means of saying how much less than that sum the produce of the years 1823 and 1824 was worth, they would have availed themselves of the opportunity thus given, of correcting any error into which the Court of Sudder Adawlut might have fallen, in taking the amount of the preceding years; but when the evidence of the defendant is looked at, it really seems to be perfectly valueless, because it depends upon the testimony of two witnesses, Volaty Ramanapa and Volaty Honoomanloo, who state, according to their judgment, what the assessment of those two-years actually was; but they are not the persons making the assessment, they had no accounts to produce to corroborate it, and they are speaking at a distance of ten years. The first witness states he is a Mirasidar, or Curnum of Gorasa, from which it would seem he had been the person making out the account; but upon an examination of the evidence, we find he was not the person making out the account, but his younger brother. And all the ground upon which he builds his testimony, that the assessment in 1823 was Rs. 950, and in 1824 Rs. 860, seems to rest upon what he states afterwards as a fact, that he used

to see these accounts, when the parties had an opportunity of producing the accounts themselves, and the parties who made the account. The Court cannot receive that as evidence of the fact of the assessment having been to that amount: he did not make it; he borrowed his knowledge from seeing the accounts only, and it therefore is not receivable as evidence of the actual amount of the assessment. The evidence of the next witness is more loose, though he states some knowledge corresponding with the other witness; he had not personal knowledge of it, and very slight means of knowledge; indeed, he says,—“As myself and the Gorasa Curnum, named Volaty “Cama Raz, are cousins, and as I used to go to Gorasa occasionally, having a “*manium* there, I understood the above circumstances,” which being translated, means “he and I used to talk them over, and that was our understanding.” But where is the cousin,—why was not he called? If it was to depend upon the evidence and the account of the Curnum, why was not he called? Having made the assessment to prove the value, the accounts were not to be the measure of the value but the knowledge of the person making the assessment would be evidence, and it might be very strong evidence, of what the value was.

Those being the only two witnesses who interfered with the conclusion drawn by the Court,—that, as the value of the village was 4,000 and odd rupees in 1819, 1820, 1821, and 1822, therefore, they might presume it was about the same time in 1823, and 1824,—it seems to their Lordships that they cannot interfere with the decision the Court have come to, in adjudging to the respondent that account, *minus* the sum he is proved or admitted to have received, 1,000 rupees; and therefore the judgment of the Court below is affirmed, but without costs.

Lord Brougham.—The judgment of the Court in the first instance gave costs in the most unaccountable way I ever saw. That judgment was reversed, and costs given to him of the first Court.

Mr. Sergeant Spankie.—Yes, my Lord.

Lord Brougham.—He has got the costs of all the three proceedings below, but no costs here.

Erskine, J.—No costs of this appeal; I have already observed that the appellant had ample means of proving the actual value of the village, because, upon the death of Niladry Row, the property reverted to the present appellant, he goes through the whole of the accounts, and an account would be rendered by the Government to him of what was received during the time it was under sequestration.

The 3rd December 1838.

Present:

Lord Brougham, Lord Denman, Sir T. Erskine, and Sir H. Jenner.

Sale of Legacy by Sheriff—Proof of extinction of Legatee's interest.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Stephen Lazar and his wife Thamar Lazar,

versus

Colla Ragava Chitty.

A seizure and sale by the Sheriff of the amount of a legacy, under a writ against the executor, declared invalid in the absence of proof of payment extinguishing the legatee's interest.

Lord Denman.—In this case their Lordships have had to consider the propriety of the judgment of the Sudder Dewanny Adawlut, in setting up a bill of sale to the respondent in this case, which the Sheriff executed, having taken possession under a certain writ which came into his hands in the year 1826. There are two very important questions with regard to the jurisdiction both of the Sheriff and the Court; in the second, because there certainly is a great peculiarity in the language of the writ, requiring him to seize goods and chattels within the jurisdiction under which he has seized lands which are not *prima facie* within his jurisdiction; and there is also great question whether the Court had a right to proceed with regard to those lands,

which their Lordships understand to be not within the jurisdiction limited by the charter of the King, but within the jaghire of the Company. However, their Lordships do not find it necessary to enter into the consideration of those very important questions; and the point not necessarily coming before them, their Lordships think they ought not to volunteer any opinion at all upon a question of such magnitude; and of course it follows that, upon the other part of the case, their Lordships are of opinion that the appellants are entitled to their judgment.

Now, that depends upon one very short view of the case, according to the opinion which their Lordships have formed of the nature of it, and we do not enter into the question of whether the proceedings have been fraudulent or not, or in what sense and for what purposes they may have been fraudulent; but the opinion which I have now to pronounce proceeds upon its being generally admitted on all hands that the appellants had an interest in this property under the will of Sultan Shamier, and that, possessing that interest as they did, there is nothing like a sufficient proof that they were in any way divested of it. We do not see how they could be divested of it except by the clearest proof of their being paid of, and that could only be for the life of the female appellant, for the family had an interest in it after her death, and we find that there is nothing to satisfy us that any such payment has taken place as to extinguish the interest of the parties.

It appears that the possession must be considered as having been changed in the year 1826, because that is the period to which the bill of sale relates, and it refers to that period. Now, at that period, the parties were actually in possession under that bill of sale, having resumed the possession of the lands of the executor and family of the female appellant, and afterwards putting them into the hands of Narcis for the benefit of these appellants. However, we do not consider that in this appeal the proceeding of the parties is to be taken as a history of a series of frauds; but with this observation, that there is a considerable appearance that this property was in Narcis for the benefit of the appellants, we pass by the charge of fraud, finding the circumstances very difficult to understand, simply saying that we are by no means satisfied that the interest which was originally created under the will of the grandfather has been extinguished by payment to these appellants; and with that view of the case, feeling that they had an interest which the creditors of Nazir (the executor of Sultan Shamier) had no right to possess themselves of, their Lordships feel bound to say that the seizure and the sale have for that reason been improper. And we think, therefore, that the judgment of the Court of Sudder Dewanny must be reversed, and the original judgment of the Provincial Court of course will be revived; and we consider that the appellants ought to have the costs of all the proceedings.

Lord Brougham.—We not only relieve the appellants from paying costs, but give their costs in the second instance, and their costs of appeal here.

The 17th December 1838.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir T. Erskine, Sir S. Lushington, Sir E. H. East, and Sir A. Jhonstone.

Evidence—Mesne profits (limited to amount claimed).

On appeal from the Sudder Dewanny Adawlut of Madras.

Sooriah Row,

versus

Cotagheri Boochiah.

The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing and thus have given rise to such an objection.

The Court cannot give more mesne profits than is claimed, although a greater amount may be proved.

Lord Brougham.—It appears to us that there is no sufficient ground for setting aside the judgment of the Court below. It is for the appellant to satisfy us that

injustice has been done to him by the decree of the Court, and it has been correctly observed, that the case of the plaintiff was scanty in point of evidence,—to which observation an answer has been made by the learned Serjeant and Mr. Moore, that from their situation the evidence of that which was in contest between the parties, namely, the amount of mesne profits, was not so fully within their reach as it was within the reach of the appellant, but there was on their part evidence enough,—*prima facie* evidence, as we should say here,—to go to a Jury. The other party had to consider how they should meet that evidence. They might have rested upon the defect of evidence; but it being incumbent upon the appellant to shew the judgment below to be wrong at the time, we must see what was the nature of the evidence before the Court. The defendant might have left the plaintiff to prevail by the force of his own case, contending that he was not called upon to answer it, unless it was such as if, unanswered, disposed of the case; but here, instead of relying upon the weakness of their case, he has undertaken to rebut it by evidence. Let us look, then, to the sort of evidence he has produced, and that which might have been expected; and, first, I would refer to the fact of a certain witness not being called upon the part of the appellant, who from his situation must have been well acquainted with the subject-matter—better acquainted than the other witnesses, and with the means of information within his reach. The next point is, with respect to the books; and whatever we may say as to the change of possession of the books in the subsequent stage of the cause under the decree at that early period, when this proof was adduced on the other side these books were within reach—were in possession of the party; and the Court, I have no doubt, proceeded upon this principle, that everything is to be presumed against the party who keeps his adversary out of possession of the property, and out of possession of the evidence, and takes means to keep that evidence in his own possession; the Court, I have no doubt, looking to the circumstances of this case, thought that everything was to be presumed against the defendant; and the proof, on the part of the plaintiff, to be pressed most strongly against him, where he kept the other party out of possession, and received the rents and profits of the estate, and kept the books in which the accounts were recorded, notwithstanding the plaintiff had given the most scanty proof of the rents and profits,—a position to which I do not quite accede. And there is another point to which the Court below must have attended, namely, that the credibility of the witness is shaken by the gross discrepancy, beyond all probability of its being founded in truth, the discrepancy between the two accounts, between four hundred rupees on the one side and upwards of twelve thousand on the other.

The observation one cannot help making upon this evidence is, that it proves too much on behalf of the defendant who gives that suspicious evidence; in answer to which it is ingeniously suggested, as it is often under the pressure of the cause, that it cannot be supposed that the witness was suborned, for that if he was possessed of common shrewdness he would not have overdone the thing, and thus have given rise to such an objection. That is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance upon it, for we do find, happily for the ends of justice, that men do fall into these inconsistencies, and by means thereof the fraudulent character of the evidence becomes apparent.* In the opinion of their Lordships, no reliance can be placed upon that remark to rebut the observation to which it is applied.

On the other point it is necessary to say only one word; the property in question was treated as separate property by that act on the part of the appellant to which we have been referred; that was the only question for our consideration, and upon the evidence we are of opinion that there is no ground to alter this decree. With respect to the damages, the Court have given the amount in the declaration; but it appears that, adding the interest, a greater amount was proved, and the Court was restrained from giving that greater amount only because they could not give more than the amount in the declaration. Considering the circum-

stances of this case, we cannot avoid giving the costs. It has been very distinctly and very ably argued, and I am bound to say, on behalf of the Court, very succinctly argued.

Judgment affirmed, with costs.

The 11th December 1839.

Present :

Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Sir H. Jenner and Sir E. H. East.

Security—Sureties.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Raja Gopal Inder Narain Roy,

versus

Raja Jagarnath Gurg.

A security voluntarily signed, existing upon the record, and never taken off the file, is a valid and subsisting security. The intentions and motives of the obligor in giving the security must be judged by what is mentioned in the instrument. The acceptance of the separate security of one surety is not invalidated by the acceptance of separate securities of five other sureties.

Lord Brougham.—THE question in this case, which was argued fully before their Lordships, was, whether a security given by Gopal Inder Narain, in the case of Raja Motee Lal *versus* Jagarnath Gurg, must be held still to be a subsisting security, as it has been decided to be in the Courts below, or not, and the ground upon which it is denied to be a subsisting security is this :—That in the case of Motee Lal *versus* Motee Hura, Gopal Inder Narain had tendered a security, and that that security,—which, be it observed in passing, and it is not immaterial to the case, was tendered by him originally alone, and upon the supposition that he was to stand as the single security without any co-obligor at all,—that that security had never been accepted, and that the whole proceedings taken together in the Zillah Court and the Provincial Court by way of appeal, and subsequently in the Zillah Court, and subsequently again in the Provincial Court, do not amount to an acceptance of the security.

Now, we are all of opinion that, if those proceedings be considered, they are manifestly and undeniably an acceptance of the security, or at least that the security does subsist as fully as if that difficulty, which alone is said to encumber the case with respect to the existence of the suretyship, never had been interposed by the order made in the Calcutta Provincial Court of Appeal on the 19th of March 1806. It becomes only necessary, in order to support this proposition, upon which the judgment below must have rested, and upon which our affirmance of that judgment proceeds, to state what those proceedings were, which I shall do as succinctly as possible, making but a very few observations as I proceed.

The Zillah Court, upon a reference to its Nizar, the proper officer (as we should refer it to the Master), and upon his report, accepted the security of Gopal Inder Narain as sufficient. When the Provincial Court came afterwards to deal with the case, on the 19th of March 1806, they made an order, proceeding upon reasons which, whether they are better or worse, it is unnecessary to enquire, but coming to the conclusion that the security of the said surety is not valid in this case, whereupon they order, "That a copy of these proceedings, containing a Precept, be sent to the Zillah Judge of Midnapore;" and having displaced, as it is contended, Gopal Inder Narain's security, the Court added: "Should the appellant, Motee Hura, presently give good security, the said Judge should cause her to enter on the contested zemindary, and if she cannot, in conformity with the order of the 27th of last month, the zemindary should be delivered in charge to Government, and the return should be forwarded on or before the 15th April."

Now, admitting, for the present, that without which the whole argument of the appellant in this case fails,—admitting that this is tantamount to an order.

rejecting the acceptance of the security, which had been accepted by the Zillah Court below,—admitting that without which, I say, this appeal cannot stand for a moment,—then observe what follows. It was referred back according to that order to the Zillah Court, when the Zillah Court respectfully, but distinctly, suggests to the Provincial Court a circumstance which appeared to the Zillah Court to have escaped the attention of the Provincial Court, namely, that the acceptance of the security of Gopal Inder has been already recorded, and therefore it appears unnecessary (this is the delicate form of expression they use, out of respect for the Provincial Court) that that security having been already accepted, and its acceptance recorded, “It appears unnecessary to inform the Provincial Court of the presentation of these papers, because they were placed in the Record Office. Now, an order has been issued by the said Court for rejecting the security of the said Gopal Inder; it therefore seems proper to send the statements above-mentioned, since Gopal Inder Narain, Zemindar, had been accepted as sufficient for this security.”

Upon this it returns to the Provincial Court once more; and see what is done by the Provincial Court. I do not say that what I am about to read as having taken place on the 13th of May 1806, amounts to a distant reversal of the order of the 19th of March, of the same year, which is the substratum of the appellant's whole argument. I do not say that what is done on this 13th of May 1816 amounts to an order rescinding the former order which stated the invalidity, by which must be supposed to be meant, according to the scope of the appellant's argument, insufficiency of Gopal Inder Narain's suretyship. I do not say that, therefore, it was an order retracing the former steps altogether, and accepting the security which at first they had refused. But I say, at least, it so far retraces the steps taken by the order of the 19th of March, as to shew that they were not dissatisfied with the order made by the Zillah Court, either in the second instance, when they remitted it to the Zillah Court, or in the first instance, when the Zillah Court accepted the security of Gopal Inder Narain, nor recollect what it was that they had done on the 19th of March. They had said that Gopal Inder Narain's security was insufficient, and that, therefore, it should be referred to the Zillah Court, with that order, and that Motee Hura should be caused to enter on the contested zemindary, if she should give good security. But observe what they now do. They say, “At this time it is not right that any order should be given for ousting the respondent who is in possession, or for changing his security, which the Zillah Judge has pronounced sufficient, because the security of the appellant is also thought sufficient.” That is to say, Gopal Inder Narain's security *plus* the security of the five kyals. Therefore, what they now say is, “Do not change the possession. Let Motee Lal give whatever security she pleases, or can give; do not change the possession because her security is pronounced to be sufficient, contrary to what we had originally thought on the 19th of March. What is that security? Gopal Inder Narain and the five kyals.”

Then comes the mode in which the Sudder Dewanny Adawlut deals with it, in which they say that, conformably to the custom, and according to the security bond, it may be demanded from Gopal Inder Narain and the other five securities; treating the whole six, therefore, as being a sufficient security. Now, this clearly shews that all these Courts,—not only the Zillah Court, not only the Court of Sudder Adawlut, but the intermediate Court, the Provincial Court, upon whose supposed rejection and final rejection it must be contended that the security of Gopal Inder Narain never was accepted; it appears that that Court, as well as the other two, considered and dealt with Gopal Inder's obligation as an existing and valid security. That appears clear; and then it was most accurately stated by the Zillah Court, and not denied by the Provincial Court, and sanctioned by the final finding of the Sudder Adawlut Court,—it was stated most accurately and correctly to be a security standing upon the record, and never taken off the file, but subsisting upon the record.

Now, one observation plainly arises upon this. Has not Gopal Inder Narain, supposing he has any case at all for being let off, mistaken his way altogether? Ought he not to have proceeded to have that taken off the record, in order to have the argument of the Provincial Court admitted and sanctioned by the Sudder Adawlut? Ought he not to have taken that course, instead of allowing it to remain on the file; allowing it to stand on the record as subsisting, and then endeavouring to escape its obligation by the argument to which I am next to refer, namely, that true it is it subsists; that true it is that he voluntarily, and with his eyes open, signed the obligation; that true it is, therefore, that there is a subsisting and valid security given by him, and which may stand alone, and which is not joint but several, which is not conditioned upon other persons, either five or one, or any of the kyals joining in the security. But the appellant says that, inasmuch as he acted upon the supposition that he was to be joined with the other five, and that the Courts acted upon a supposition that the other five were joined with him, they did not accept him alone, but accepted him in conjunction with those other five. Now, that is the whole of the residue of the argument which I have not hitherto dealt with in the narrative I have given of the facts of this case.

First, then, it is said that he himself considered that he was only bound, in the event of the other five being bound: of what avail is it what a person considers who gives an obligation? You are to look to what he does, not to what he thinks; you are to gather what he means from what he has said in his instrument, not from what he suggests; now, in order to escape the obligation of that instrument, you are to look to his obligation which he has contracted in point of fact and in point of law—an obligation which is binding upon him,—not to the intention and motives, and expectation and speculation, which he may have had in his own mind at the time he so bound himself. If he really had intended only, and meant only, to bind himself in this cause upon the supposition of his being bound together with the five kyals, he ought to have framed the security in a perfectly different manner, he ought to have made it a joint security with those five kyals, which would have given him his remedy against them, and he ought to have made it conditional upon those five kyals becoming a subsisting security together with himself. He has done no such thing; and it must further be remarked, as I stated in the outset of my narrative, that he originally (which I think cuts even that little ground from under his feet as to what his views and intentions were) tendered his security absolutely, singly and alone, and reckoned upon his being the only security in the cause, and it was received as such; but then the others were added for greater security. For whose benefit were the others added? Not for the benefit of Gopal Inder Narain, who had originally tendered himself alone, and, as so tendered, had been accepted; no such thing, but for the better security of the appellant in the cause.

The next, and lastly, it is said that the Court only accepted him conditionally, because they accepted him together with the other five. Now, really I think, if the former view of the case was of little avail to the appellant, this can be still less, because the Court have accepted him alone in point of fact; but I go further, and say that, if they had accepted him with the other five, that would be immaterial for the purpose of this argument, for if they accepted him with the other five, and he bound himself unconditionally without the other five, the Court accepts him according to his obligation. They accept him as a separate security. They accept the other five as separate securities, and that acceptance is valid and effectual, and finished and executed as to him, without the least regard to the other five; because it must be an acceptance in conformity to, and according to the tenor of the whole obligation, with which, in the first part of the argument respecting the joint suretyship, I have dealt. It would be just as good an argument,—and this is really a *reductio ad absurdum* of this part of the appellant's case,—it would be just as solid a ground of escape for Gopal Inder Narain to say (and this applies to both parts of the case), it would be as good an argument to set up this:

"I gave my security, I tendered myself as a surety, upon the supposition that the other five sureties would be sufficient, and the Court accepted me upon the supposition of the other five kyals being sufficient; if the five kyals prove insufficient, therefore *cadet questio* as to me, for I never meant to bind myself upon that supposition, and *cadet questio* as to the Court, for they never meant to accept me upon that supposition." But can anything be a greater absurdity than this? because this is the very case provided for. The reason why Gopal Inder Narain's security is taken as well as the other five is, in case they should prove insufficient. So that, according to the scope of that argument, the very purpose for which Gopal Inder Narain is added to the five kyals, namely, the possible insufficiency of the kyals, would be set up as a reason for letting off Gopal Inder Narain; the very ground of taking Gopal Inder Narain being the possible insufficiency of the other five.

Upon the whole, therefore, we are clearly of opinion that this is a valid and subsisting security. In the course of the argument some illustration was thrown out with respect to the case of recognizances entered into by the Court, with respect to which the acceptance is supposed necessary to perfect it. It is unnecessary, for the further illustration of this question, to enter into that, but, upon the grounds already stated, their Lordships are of opinion, without any doubt whatever, that this appeal must be dismissed, and dismissed with costs.

The 10th July 1840.

Present :

Lord Brougham, Mr. Justice Bosanquet, Sir H. Jenner, Dr. Lushington, and Sir E. H. East.

Hindoo Law of Inheritance—Widow Ranee, (Right of—to alienate)—Wussee-yutnamah—Gift.

On Appeal from the Sudder Dewanny Adawlut of Eengal.

Keerut Sing,

versus

Koolahul Sing and others.

A childless widow Ranee has no power to alienate her deceased husband's property as against his collateral heirs by a wussee-yutnamah or deed of gift.

Dr. Lushington.—THIS appeal is preferred against three decrees of the Court of Sudder Adawlut, bearing date the 19th of January 1825, confirming three decrees, made by the Provincial Court of Patna on the 19th of February 1823. The property involved in these suits appears to be very considerable, and on the death of the last possessor, the Ranee, the widow of Juswunt Sing, became the subject of litigation, and gave rise to the three suits already mentioned.

It is not necessary to enter into the particulars of the suits further than to say that the respondents claimed in various proportions the whole property as heirs of the Rajah last in possession. The present appellant, Keerut Sing, claims this zemindary upon several grounds: *first*, by virtue of a wussee-yutnamah or deed from the Ranee, the widow of the Rajah Juswunt Sing, the last proprietor, who died in possession of the property. This deed bears date the 5th of July 1813, the Ranee having died herself on the 26th of October 1818. *Secondly*, the appellant alleges himself to be a relation of the late Rajah, though not, as was admitted at the bar, the nearest relative. *Thirdly*, he claims as in possession, denying that the respondents, the plaintiffs in the Court below, have made out their title. Both Courts have pronounced against his claim, and in favor of the respondents.

It may be expedient in the first instance to examine his title under the alleged deed; because, if the deed were validly executed by a person having

legal authority so to dispose of the property, all other questions would be unnecessary; and in considering the title preferred under the deed, the power of the Ranees so to dispose of the property is obviously the first consideration; for if that question be determined in the negative, none can arise as to the execution.

Then, as to the power of the Ranees to dispose of the property, assuming Keerut Sing to be a near relation of her deceased husband; this question was put by the Court to the Pundits, and answered decidedly in the negative; that will appear by reference to the Appendix, folio 212.

There does not appear to be the least reason to doubt that this answer is a true exposition of the law which must govern the claims of all parties to the property. It is in conformity with the law, as laid down and acted upon in former cases.

This doctrine, too, is recognized by the Judge of the Provincial Court, Appendix, page 225, and also in his judgment of the 19th of February 1823; and this decree is affirmed by the Judge of the Sudder Dewanny Adawlut, on the 19th of January 1825, but without stating the law particularly.

As we are all of opinion that the law has been correctly laid down, and that the Ranees had no power to execute a deed of this tenor, all title on behalf of the appellant, as founded on this deed, necessarily falls to the ground; and in this view all questions as to the execution of the deed require no consideration. But as a title, on the footing of possession, has been set up, we have not deemed it right wholly to pass by the question of execution.

Keerut Sing had been the Mookhtar or general Attorney of the deceased Ranees, and employed confidentially by her. Many witnesses have been examined to prove the due execution of the deed, executed, beyond all question, if executed at all, under most suspicious circumstances. We do not think we are called upon to pronounce the whole to be a forgery; neither, on the other hand, are we satisfied, on looking to the evidence and the discrepancies therein, that the whole proceeding was *bond fide*, so that the whole defect was the want of title in the grantor. We think that there is no sufficient ground for holding that the appellant was a *bond fide* possessor by reason of this deed.

The appellant further alleges that his possession should not be disturbed by reason that the respondents are not the right heirs. Now, first, as to his possession, the facts appear to be as follow:—The appellant being Mookhtar, as already stated, of the late Ranees, and resident with her on her death, on the 26th of October 1818, took possession of the property. The property was attached, by decree of the Judge of the City of Patna, on the 26th of December 1818, with permission to any of the parties to institute a suit in three months. In the month of September 1821, that decree was reversed by the Provincial Court, and the appellant restored to the possession of the property. Several suits were then instituted, and on the 14th of June 1822, the Provincial Court took charge of the property by the appointment of a Surbarakar. There was also a claim preferred on behalf of the Government for the property as an escheat, but it does not appear that the claim was prosecuted. We are of opinion that this is not such a possession as can be regarded with any favorable eye. It is not necessary to say how it should be dealt with, if there was no title at all in the respondents. It is sufficient to observe that, though doubts may exist as to the proportions in which the claimants should share, we think the decrees appealed from are right to the extent that the respondents, in some proportion or other, are entitled to the whole property. As against them collectively, the appellant has no right at all.

Under these circumstances, we intend to affirm the decrees of the Court below. There are, in point of fact, it may be said, three decrees of the inferior Court and three decrees of the superior Court; for all the suits seem to have been considered as one combined suit. Their Lordships think it right not only to affirm

these decrees appeared from, but also with costs. They do not think it necessary to enter more particularly into the evidence, inasmuch as they affirm these decrees; but they are of opinion, looking at all the circumstances attending the taking possession of this property, and the manner in which the deed is alleged to have been obtained, that it is their duty to affirm the decrees with costs, and to discourage such attempts to take property from the right heirs by doubtful deeds of gift, and erroneous assertions of heirship.

Decrees affirmed with costs.

The 15th February 1841.

Present :

Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

Hindoo Law of Inheritance.—Widow's Life-Estate.—Practice of Privy Council (as to matters of form in appeals from India)—Wusseeutnamah—Gift—Proclamation (under Section 13 Regulation III. 1793)—Onus Probandi (indivisibility of Raj).

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Ghirdharee Sing,

versus

Koolahul Sing, Neemdharee Sing, and others.

A widow is entitled by law to a life-estate in her husband's property.

In reviewing proceedings of the Courts in India where the Hindoo and Mahomedan Laws are the rule, and where the forms of pleadings are wholly different from those in use in Courts where the Law of England prevails, the Privy Council will look to the essential justice of the case, not considering whether matters of form have been strictly attended to.

Where a suit for possession is brought upon an alleged wusseeutnamah or deed of gift, and the Court directs, in conformity with Section 13 Regulation III. 1793, proclamation to be made for all persons having claims to the property to come in, the plaintiff cannot be allowed, after the decree is pronounced giving him but a small share of the property he claims, to object to the proceedings on the ground that the rights of the parties entitled to the property were not put in issue, and that he was prevented from adducing evidence in support of his case.

Where a party alleges a Raj to be indivisible, and that he is, as heir, entitled to succeed to the whole, the *onus* of proof is on him.

Right Honourable Dr. Lushington.—Raja Juswunt Sing was the last male possessor of this property, which forms the subject of the present appeal. He died in the year 1801. Upon his death the Ranees, his widow, obtained possession, being entitled by law to a life-estate. In 1818, October 26th, she also died, and then commenced the litigation which has produced the appeal now to be decided.

Their Lordships have already disposed of another appeal relating to the same property, to the particular circumstances of which it will not be necessary to advert, though some of the facts must be stated to render the judgment now to be given more intelligible.

Upon the Ranees' death, several persons preferred claims to the property. Keerut Sing founded his title on an alleged wusseeut or deed of gift from the deceased Ranees, averring also that he was a near relation. He being Mookhtar and resident with the Ranees at the time of her death, immediately took possession of her estate and property. Some of the other claimants having disputed Keerut Sing's right, disturbances arose. The Judge of the City of Patna, by decree dated 26th December 1818, attached the property, giving to any of the parties permission to bring a suit; but in September 1821, such decree was reversed, and Keerut Sing again put into possession, the other claimants being left to their remedy by regular suit.

On the 20th of December 1821, Koolahul Sing filed his plaint in the Provincial Court of Patna against Keerut Sing, and in this proceeding he alleged the hereditary right of succession to the property attached to the descendants of Lal Sing,

his grandfather, and to the descendants of Kulal Chund, the grandfather of the grandfather of Ghirdharee Sing, in proportion of a moiety to each branch.

On the 31st December, in the same year, 1821, Ghirdharee Sing filed his plaint against Keerut Sing, and therein he claimed the whole by descent, alleging also a wusseyut made to him by the Ranee, transferring the property. On the 23rd of May 1822, the suit of Ghirdharee Sing having been called before the Court, the Judge issued an order that proclamation should be made for all persons pretending to have any claim to the property of the deceased Ranee to appear in six weeks, and prosecute their claims, such order purporting to be made in pursuance of Section 13 Regulation III of 1793.

On the 24th of August 1822, Neemdharee Sing filed his plaint against Keerut Sing, and therein he stated himself to be the youngest brother of Ghirdharee Sing; he alleged that, according to the custom and rule of the family, the youngest brother ought to succeed to the raj and musnud, and further averring that, if his claim on the ground of custom should be rejected, the property should be divided equally among the heirs. In those three suits each of the plaintiffs produced documentary evidence, and Ghirdharee Sing also examined witnesses. Keerut Sing, the defendant, also filed many documents and examined some witnesses.

In February 1823, the Collector of Behar filed a claim for the property on behalf of the Government, on the presumption that none of the claimants could establish a title. On the questions of law which arose in the various suits, the Court took the opinion of the Pundits, and on the 19th February 1823, proceeded to deliver judgment in all the three suits. By such decrees the Court pronounced against all the pretensions of Keerut Sing, the defendant, and divided the property into two parts, giving one part to the descendants of Mya Ram, and the other to the descendants of Doolab Sing. The effect of this decree was to give an eighth part of the whole to Ghirdharee Sing, another eighth part to Neemdharee Sing, and one quarter to Koolahul Sing and others, who were the heirs of Mungul Dutt.

From these decrees there were four appeals to the Sudder Dewanny Adawlut; three by Keerut Sing against each of the three original plaintiffs, and one by Ghirdharee Sing against Koolahul Sing and others entitled to shares by the decrees of 19th February 1823.

The decrees last mentioned were affirmed by the Sudder Dewanny Adawlut, and these decrees form the subject of the present appeal.

The first objection raised on behalf of the appellant is, that in the Court below some of the questions which have been determined by the decree were never put in issue, and that in consequence the appellant is aggrieved, not by this omission only, but by being deprived of the opportunity of producing evidence material to support his case. But their Lordships are of opinion that this objection is in both respects void of any solid foundation. In reviewing the proceedings in India, whence the appeal is brought from the Courts where the Hindoo and Mahomedan laws are the rule, and where the forms of pleading are wholly different from those in use in Courts where the law of England prevails, this Court must look to the essential justice of the case, not considering whether matters of form have been strictly attended to.

The objection is, that in the Court below the only questions really put in issue were, whether Keerut Sing, the appellant in the former appeal, was entitled to the raj by virtue of the deed of gift or otherwise, and that the claims of the parties to the present appeal were not directly put in issue. But it is quite manifest, from the whole course of the proceedings, that all parties well knew and acted upon the knowledge that the suits were not only to decide upon the claims of Keerut Sing, but to determine also what parties were entitled to the property the subject of the suit. The parties legally must be presumed to know the regulations of the East India Company on this subject. But the case is not left to that presumption, for, on the 23rd of May 1822, as has been already stated, the Court, in the very

suit where the present appellant was plaintiff, directed, in conformity with Section 13 Regulation III of 1793, proclamation to be made for all persons to come in who had any claim to prefer to this property. It is wholly impossible, therefore, that the appellant could be ignorant of the nature of the proceeding, nor do we find any objection raised by him until after the decree had been pronounced giving him but a small share of the property he claimed. Nor does the objection, that the appellant was prevented from adducing evidence which might have supported his case, stand upon any more solid foundation; for, even supposing that he or his advisers labored under any mistake whilst the proceedings were pending in the inferior Court, it is manifest that the decree of the inferior Court at once brought the matter to their knowledge, from their own complaint that, when the cause got into the superior Court, the Sudder Dewanny Adawlut, they were well aware of all possible difficulties arising from any omission; and yet, though the Court is in the habit of receiving fresh evidence, and actually did receive it in this case, the appellant, though in the petition of appeal he has stated this as a ground of complaint, never petitioned the Court to admit any additional evidence, nor has at any time attempted to specify what evidence could be brought forward.

These objections, then, being of no weight, the points in the case are few and simple.

It has been contended that this raj is an indivisible raj, and that the appellant is, as heir, entitled to succeed to the whole. Now, both the Courts below were of opinion that the evidence produced wholly failed to establish the position that this raj was indivisible, the *onus* of proof, under the circumstances, clearly lying upon the appellant. The Course of possession and enjoyment is most distinctly opposed to such a claim. The property had been held jointly, or, as it is termed in the judgment of the Court below, in co-parcenery, and Mya Ram, through whom the appellant makes his claim, had himself, upon a former occasion, set up a title to the property entirely inconsistent with the judgment of the Court; nay, even the appellant himself, at the commencement of these proceedings, filed a document in conjunction with the respondent setting forth a joint claim. Any claim on the ground of adoption falls to the ground for nearly the same reasons, as well as for defect of proof. Under these circumstances, their Lordships are of opinion that the appeal must be dismissed with costs.

The 15th February 1841.

Present :

Lord Brougham, Mr. Justice Bossanquet, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

Mahomedan Law—Endowment—Wukf property not alienable.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Jewan Doss Sahoo,

versus

Shah Kubeer-ood-deen.

According to Mahomedan Law, *wukf* or endowed property is not alienable. *Wukf* property is not the less *wukf* property, because of the use of the words "Inam" and "altamgha" in the grant, provided the grant clearly appears to have been intended for charitable purposes. A *mutwallie* or superintendent of an endowment is not barred by limitation if he sues to recover possession of endowed property within twelve years from the date of his appointment.

Bosanquet, J.—THE respondent in this case, on the 17th of September 1822, commenced a suit against the appellant by plaint in the Provincial Court of Patna, to recover certain villages alleged to have been inalienably appropriated by royal grant to the support of a Khankah or religious house of which the plaintiff was a superior or Sijjada Nashin.

These villages, on the 27th of January 1807, were transferred to the defendant by Shah Shumsh-ood-deen, the plaintiff's father, then the Sijjada Nashin, as a security for the repayment of a loan of Rs. 23,501, which transfer was absolute in form, but of which a defeazance (meadi-ikrarnamah) was executed on the same day by the defendant and provided that, if the sum advanced should be repaid on or before May 1809, the sale should be void; if not, that the villages should become the absolute property of the defendant. On the 2nd of February 1810, Shah Shumsh-ood-deen, in consideration of a further sum of Rs. 5,000, executed another instrument (ikrarnamah) purporting to convey the villages to the defendant absolutely; and on the 5th of the same month, Shah Shumsh-ood-deen died.

On the part of the plaintiff, it was contended that the property in question, being granted for the maintenance of a religious establishment, was to be considered as *wukf* or appropriated, and therefore inalienable; that if not inalienable, the transfer of 1807 was conditional in the nature of a mortgage, which, by the Bengal Regulation XVII of the year 1806, could not be foreclosed or made absolute without taking certain proceedings which were admitted not to have been taken in this case; that the transfer of 1810, which purported to be absolute in consideration of the payment of Rs. 5,000, was fraudulent and void, having been made by Shah Shumsh-ood-deen in his last illness and shortly before his death, and consequently that the transfer of 1807, which was originally conditional, had never become absolute.

On the part of the defendant, it was contended that the property in question was not *wukf*, but a proprietary interest given by royal authority to the grantees and their heirs as hereditary property which they were at liberty to dispose of; that the transfer of 1807, admitted to be conditional, had by the sale of 1810 become absolute notwithstanding the omission to take the proceedings prescribed by Regulation XVII of 1806, such sale of 1810 being *bond fide*; and further, that having been made by Shah Shumsh-ood-deen, the heir of the persons named in the royal grant as grantees, the right of the plaintiff to sue for the recovery of the villages was barred by lapse of time, more than twelve years having elapsed from the time of the sale in February 1810, to the commencement of the suit in 1822, for which Regulation III of 1793 and XI of 1805 were relied on.

The plaintiff appears to have been under age at the death of his father in 1810, but in 1819 he was appointed by the Government to be Mutwalee, or manager of the establishment, and Sijjada Nashin, or superior thereof, at which time it is to be presumed that he attained his majority.

The villages in question were granted by two royal firmans, the first by Mahomed Feroksir, 14th March 1717, the second by Shah Alum, 13th October 1762.

The first of these instruments states that a firman has been issued that one lakh of dams from Pergunnah Havily Suhseram in sooba Behar, which yields the sum of about Rupees 1,179 to the royal treasury, are endowed and bestowed for the purpose of defraying the expenses of the Khankah of Sheikh Kubeer Dervish as an altamgha grant, and that it shall be established according to the specification made therein. The children of the Sovereign, the Ameer, and those who transact the affairs of State, and the jaghiredars and their successors, are enjoined to relinquish the said dams to the aforementioned individual for him to manage and control, and to descend to his heirs in succession from remove to remove, and they are required to consider the grant in every respect exempt from all contingencies, and not to demand from the said person a fresh sunnud annually. Upon this instrument, a memorandum is endorsed that one lakh of dams have been granted by His Majesty as an altamgha for the use and expenses of the Khankah of Sheikh Kubeer Dervish.

In 1744, on the petition of Sheikh Gholam Shurf-ood-deen, the grandson of Sheikh Kubeer, who had succeeded him as the Sijjada Nashin, a perwannah was

granted by Mahomed Shah enjoining the chowdries, cultivators, &c., to consider the said one lakh of dams as an altamgha-inam by virtue of the perwanna of His Majesty for the purpose of being appropriated to the charge of the travellers to and from the Khankah of the said Sheikh Kubeer, as it stood before, to descend to the offspring in succession, and to refrain from taking from the said Gholam Shurf-ood-deen, as was the rule before, the true and fair revenues payable to the State and the Dewanny taxes, and enjoining them not to deviate from what may be for the benefit of the person in question.

The terms expressing the grant to have been made for the purpose of meeting the charges of the Khankah, and the travellers who frequent the Sheikh Kubeer Dervish, are repeated several times in the endorsement.

A similar perwanna was granted on the petition of Sheikh Kiam-ood-deen, the son of Sheikh Gholam Shurf-ood-deen, after the death of his father ; and it is declared that Sheikh Kiam-ood-deen is established in the Sijjada Nashin in the same manner as his father and grandfather were.

The second instrument of the third year of Shah Alum, about the 18th of October 1762, is a grant, nearly similar in form, of two lakhs and eighty-one thousand dams, the produce of which is Rs. 3,000, to be fixed as an altamgha-inam to the sanctified Sheikh Kiam-ood-deen, for the purpose of defraying the expenses of the frequenters to and from him, exempting the lands from the present assessment and from all that may be realized thereout by his good management ; and the children and viziers, &c., of the Sovereign are enjoined always to maintain and uphold the said order, and to relinquish the aforesaid dams to them, to descend to the offspring in succession to be enjoyed by them ; and deeming this grant free from the contingency of alteration or change, the public officers are not to demand anything from them upon the score of revenues or charges, and to consider the grant free of all Dewanny taxes, or for any writings whatever made on account of the State ; deeming this a full and positive injunction, they are not to demand a fresh sunnud annually, nor deviate from these royal and munificent orders.

Upon this instrument a memorandum was endorsed, that 2,81,000 dams have been granted by His Majesty in pergunnah Suhseram, &c., as an altamgha-inam to Sheikh Kiam-ood-deen for the charges of the Fakirs.

The proceedings in another suit, commenced by the plaintiff on the 6th of April 1821, against Mussumat Beeby Ismut, the widow of Shah Shumsh-ood-deen, to recover from her certain other villages comprised in the same royal grants, and claimed as *wulaf* property, were put in with the decree of the Sudder Dewanny Adawlut of the 24th of August 1824 therein, in which proceedings were set forth certain opinions of native law officers respecting the nature of *wulaf* property taken under the authority of the Court.

The present cause being brought before Mr. Fleming, Third Judge of the Provincial Court of Patna, on the 29th of December 1825, he determined that as the disputed villages had been sold conditionally, and the conditions of the Regulation XVII of 1806 not fulfilled, the transaction could not be considered a *bond fide* sale ; that the second ikrarnamah executed by Shah Shumsh-ood-deen, the date of which (he said) was one day only before the death of the said Shah, which fact, he says, the defendant does not deny, is invalid : in addition to which, according to the decision pronounced by the Sudder Dewanny Adawlut, (*i. e.*, in the suit against Beeby Ismut) a conveyance like this is not legal. On consideration, therefore, of all the circumstances, he considered the conditional sale to stand in the character of a mortgage, that it was therefore necessary to make up an account of the produce of the villages, and of the principal and interest received by the defendant, and therefore ordered him to file the wasilat papers.

On the 2nd of February 1826, the defendant presented a petition to the Provincial Court, that witnesses might be examined in regard to the second ikrarnamah. The cause coming on again before Mr. Fleming, on the 19th September 1826, he deter-

mined that, as the grounds on which the ikrarnamah in question had been rendered null and void had been recorded in the proceedings holden on the 29th of December 1825, no further orders could be passed on that head, but on the plaintiff stating that the accounts of the defendant were erroneous, it was ordered that the proceedings should be suspended; and Mr. Fleming having, on the 18th of November 1826, expressed suspicion respecting the genuineness of the accounts, thought proper to give time to the plaintiff to falsify them, and as he was going the circuit, he directed the cause to be brought on before the Fourth Judge, before whom another cause connected with the present was pending.

On the 25th of April 1827, Mr. Steer, the Fourth Judge, ordered that an enquiry into the accounts should be made through the Collector of the Zillah Shahabad, and a return was made by the Collector, the particulars of which it is not necessary to notice.

On the 25th of June 1827, Mr. Steer pronounced the following judgment:—That if the conditional sale writing had stood, in that case a *bond fide* sale could not have been effected without acting up to the provisions of Regulation XVII of 1806, but as the conditional sale did not stand by Shah Shumsh-ood-deen having taken a further sum of Rs. 5,000, and returned to the defendant the ikrarnamah which this individual had executed, which circumstance had taken place more than fifteen years, reckoning to the period the suit was brought, justice demanded that, after the lapse of so long a time, the defendant should not be deprived of the full and final *bond fide* sale; that after the period of limitation had gone by, the plea that the ikrarnamah, dated the 2nd of February 1810, was written only one day before the demise of Shah Shumsh-ood-deen, could not be admitted; that the villages had been sold in the character of a *bond fide* sale after the period of a conditional sale expired, and that the grounds on which these lands were deemed not to be a *wukf* endowment had been recorded in the proceedings holden in a cause, No. 803. For these reasons, he ordered that the plaintiff's claim should be dismissed with costs of suit.

The plaintiff having appealed from this judgment to the Sudder Dewanny Adawlut, the appeal came on before Mr. Ross, Judge of the said Court, on the 30th of January 1830, who, after stating the conditional and absolute bills of sale to the defendants, the death of Shah Shumsh-ood-deen, and that after his death, his widow, Mussumat Kadira (Beeby Ismut), held possession of the villages mentioned in the two firmans till 1819, together with other property of the deceased as malikeh or proprietress; that in 1819 the local agents, knowing the villages mentioned in the two firmans to be (*wukf*) property appropriated to religious purposes, appointed the plaintiff to their management as procurator, who instituted a suit against her for these villages and others acquired by the profits of them; and that having proved their appropriation to religious endowments (*wukf*), he obtained a decree, which decree, as proof of the property being an appropriation (*wukf*), was affirmed by the Sudder Dewanny Adawlut, and after stating the proceedings instituted in the present suit, he proceeded thus—“As the villages in dispute were of the number mentioned in the two firmans, according to which firmans on proof of the villages being (*wukf*) appropriated, the case No. 2340 (Mussumat Kadira, Appellant, against Shah Shumsh-ood-deen, Respondent), was decided by this Court on the 24th of August 1824:” hence, in this case two points demand consideration,—1st, whether Shah Shumsh-ood-deen, the villages in question being *wukf* (appropriated) property, had or had not the right of alienating such *wukf* (appropriated) property, either by *bye-bil-waffa* (conditional sale), by *bye-meedy* (absolute sale), or by any other sort of assignment. As to which he says, “The *futwa* (law opinion), of the law officers of this Court makes this point clear and manifest, *viz.*, that a *mutwalee* (procurator) has no right to alienate *wukf* (or appropriated) property by *bye-bil-waffa* (conditional sale) or by any other kind of transfer.”

"Secondly," he says, "that from the 2nd of February 1810, the date of the *ikrarnamah* (agreement-bond) executed by Shah Shumsh-ood-deen, more than twelve years had elapsed; that Mussumat Kadirah, his widow, as *malikeh* (propriess), held possession of the property that had been seized of the aforesaid Shah, and that Shah Kubeer-ood-deen, in the month of April 1819, had been appointed *mutwalee* (procurator) agreeably to the orders of the local agents."

Under these circumstances, he states the question to be, whether the suit of the plaintiff is or is not worthy of being entertained by the Court; and pronounces his opinion that, if from the date of the *seisin* by a person who believed the seller to have power to sell, and no usurpation or fraud was imputable to the seller, the right of the person seized would be well founded agreeably to Section 3 of Regulation II of 1805: and he states that Section 14 of Regulation III of 1793 would apply to his case; that the absolute sale of 2nd February 1810 was fully proved, and neither the plaintiff, nor any one for him, during the twelve years, demanded his right, nor did defendant admit it or promise payment, nor did the plaintiff advance his claim in any Court; that the plaintiff did not appear to have been prevented by minority, having attained the age of majority in 1819, when he was appointed to the superintendence of the *wukf* property, three years before the commencement of the suit; and that, with reference to Section 14 of Regulation III of 1793, his claim was beyond the limit of cognizance. As in this case, however, Government was neither plaintiff, nor had the appellant its sanction for instituting the suit, hence, in his judgment, Section 2 of the Regulation II of 1805 cannot be applied to this case; still, although the Government was not plaintiff, yet in consequence of the property in question being *wukf* or appropriated property, and the plaintiff appointed *mutwalee* (procurator) by Government for the management of the *wukf* (appropriated) property which is consecrated for the entertainment of travellers, he thought there was reason to question whether the provisions of Section 2 Regulation XI aforesaid could affect such a case or not; that up to the present period no case of the kind has ever been tried by the Court, consequently the passing of a final order in this case by one Judge did not appear expedient. It was therefore ordered that the papers for a final order should be laid before the two other Judges of the Court.

Mr. Turnbull, another Judge of the Sudder Dewanny Adawlut, before whom the cause was brought, having differed in opinion from Mr. Ross, on the 11th February 1830, ordered the papers to be laid before another Judge; accordingly, it came before Mr. Leicester and himself on the 18th February 1830, who, after stating their opinion that Mr. Steer had no power to decide the case singly in opposition to the opinion of Mr. Fleming, but that he ought either to have postponed the case till the return of Mr. Fleming, or if he thought the enquiry by Mr. Fleming incomplete, to have recorded his opinion, and referred the case to the final order of another Judge; that his decision, founded on the authenticity of the *ikrarnamah* of the 2nd of February 1810, which he pronounced to be authentic without evidence, and of the verity of which strong suspicions appeared, was indeed extraordinary; since, therefore, the decree of the Provincial Court could not be sanctioned, it became necessary to enquire into the merits of the plaintiff's claim, and with that view to consider, "First, whether an inquiry in regard to the *ikrarnamah* of the 2nd February 1810, in order to remove the objection of the respondent by calling for evidence of its authenticity, was or was not necessary?" As to which they say, "In our opinion an enquiry in regard to the instrument in question is neither necessary nor beneficial to the cause of the defendant, for in the event of the instrument in question on enquiry proving valid and authentic, yet the sale by the late Shah Shumsh-ood-deen of the villages mentioned in the instrument in question is altogether improper and illegal, for the villages in question are proved to be of the number of the *wukf* or appropriated villages. In such a case the deceased Shah had no power by law to alienate them."

"Secondly, whether the claim of the plaintiff, considering the lapse of twelve years from the date of the ikrarnamah, was cognizable by the Court." On this question their opinion was, "That, independently of the circumstance that, up to the present date, the ikrarnamah of by-bat (absolute sale) has not been proved in such wise as to change the aspect of the first or bye-bil-waffa case (conditional sale) and that there appears no necessity to take evidence in regard to its authenticity, in consideration of Shah Shumsh-ood-deen having no power to alienate the villages in dispute, yet the ikrarnamah in question, even if it were proved authentic, could not bar the claim of the appellant, because the appellant was appointed by the local agents to the officers of the mutwalee (procurator) and sijjada-nashin (superior) of the khankah or monastery of Sheikh Kubeer Dervish (hermit) in 1819." It is obvious, therefore, they say, that, from the date of his appointment, only the superintendence of the wukf (appropriated) villages appertaining to the khankah in question devolved to his care, and previous to that time he had no concern whatever with that matter. In such a case, agreeably to the intentions of Section 14 of Regulation III of 1793, the claim of the appellant in every way appears worthy of being entertained by the Court.

"Thirdly," they say, "although according to usage in cases of bye-bil-waffa (conditional sale) it behoves that the purchase-money of bye-bil-waffa should be caused to be paid by the plaintiff to the defendant after the latter shall have accounted for the wasilat (mesne profits) of the villages in dispute, yet as the estate in question was lakheraj, or rent-free, and a profitable one, and has, moreover, been in the possession of the respondent ever since the year 1806-7 up to the present time, a period of sixteen years, it is presumable that in such a length of time the purchase-money (principal and interest) must have been realized by the defendant from the mahal (district) in question. For this reason, and also in consideration of the seisin of the defendant in the property in question being illegal, and the payment not lying in the plaintiff, who is the mutwalee (procurator) and superintendent, an ascertainment of the wasilat (mesne profits) is deemed unnecessary but rather with a view of putting an end to the dispute and the suffering of the parties, it is deemed proper that neither the purchase-money be caused to be paid by the plaintiff to the defendant, nor the wasilat (mesne profits) money be demanded of the defendant by the plaintiff.

The Court, therefore, decreed in favour of the plaintiff's claim, reversing the decision of the Patna Court, and directed the costs of the parties in both Courts to be defrayed respectively by each.

Such being the determination of the Court of Appeal, their Lordships are to consider whether that Court has determined rightly. *First*, that villages contained in the royal grants were to be considered as wukf, and therefore inalienable in any manner whatsoever. *Secondly*, that, notwithstanding the lapse of time, the plaintiff, in the character of mutwalee, to which he had been appointed by Government in 1819, was entitled to recover those villages. *Thirdly*, that, as the possession of them by the defendant was illegal, and as the plaintiff was not the debtor of the defendant, he was not bound to repay the money advanced. With respect to the determination that the plaintiff ought not to have any account of the mesne profits, as the plaintiff himself has made no complaint, it is unnecessary to consider it.

The question whether the property mentioned in the two royal grants was to be considered as wukf, or as a proprietary right, was much discussed in the above-mentioned case of Kubeer-ood-deen (the present plaintiff) against Mussumat Kadira, and the opinions of the native law officers taken in that cause being found to be contradictory, it became necessary to consult the futwas of lawyers in cases formerly decided by the Court respecting wukf endowments, and the decision of the Sudder Dewanny Adawlut, of the 1st of March 1814, in the case Kulla Ali Hossein *versus* Syf Ali, together with a futwa of a former Kazi-ool-

Kouzat of the Sudder Dewanny Adawlut, and of the Mufti of that Court, were referred to.

The terms of the firman of Aulum Geer in that cause ran thus : " As it has come to the knowledge of His Majesty that, agreeably to a sunnud furnished by the Hakims, certain mouzas situate, &c., have been appropriated for the purpose of meeting the charges of fakirs and students of the Madrissa, and the Khankah, and Musjid of Moolla Dervish Hossein, son of Moolla Gholam Ali, and the aforesaid individual is hopeful for the royal munificence and favor, His Majesty's royal commands are that, in the event of the aforesaid mouzahs being in the occupation and enjoyment of that individual, the whole of their mouzahs shall continue as they formerly were at a jumma of 15,000 dams from (such date), in the character of a maddad mash (aid for subsistence), according to the tenor of the grant, and in order that he may apply the produce of these lands to meet the charges of the students of his Madrissa and Musjid, and the present and future Hakims, the Amils, &c., are enjoined to relinquish the mouzah in question to that person's occupation, to deem them maaf (exempt from tax), and blotted with the pen in every respect, and not to require of him a fresh sunnud annually. Should that individual occupy anything in any other way, they are not to countenance him." Upon reading the firman, the Kazi-ool-Kouzat and the Mufti gave their futwa as follows :—" As in the firman it is written that the produce of the lands specified therein is to be applied to meet the charges of students of the Madrissa and Musjid of Moolla Dervish Hossein, and as it is not written that the said Moolla shall appropriate the produce to meet the charges of his family and children, or that he shall enjoy the same with his family and children, it therefore appears to us that the lands in question have been fixed as wukf in the character of maddad mash, and are not liable to sale or gift."

Agreeably to the above futwa, the Judges of the Sudder Dewanny Adawlut decreed that the litigated lands contained in the firman in question were a wukf endowment, and were not disposable by sale or gift, the grounds of which judgment (it is said) are fully stated in the decree of that Court, under date March 1st 1824.

It is to be observed that the word " wukf " was not mentioned in the firman, and that the individual on whose application the grant was made, Moolla Hossein, was expressly named. In the Report of this Case II., Macnaghten IV., it is said that the terms of the firman declared that the general superintendence of the resources should be confided to Dervish Hossein, and should remain vested in him, his heirs, and successors for ever, and that the law officers declared that the appropriation of land or other property to pious and charitable purposes is sufficient to constitute wukf without the express use of that term in the grant, and that the alienation of such property from the purposes intended is illegal.

After referring to this case, and the opinions of the law officers, the Court of Sudder Dewanny Adawlut, in the case of Kubeer-ood-deen *versus* Mussumat Kadira, appear to have determined that, notwithstanding the use of the words " inam," and " altamgha," in the royal grants, and the mention therein of persons upon whose petition the grants were made, yet as these grants appeared clearly to have been made (as expressed in the petitions) for the purpose of maintaining a charitable institution, the persons named were not to be considered as proprietors, that the establishment (the khankah) was the real donee, and the persons named were only mutwalees of the khankah, that a mutwalee has no right to alienate, and consequently that the transfer by gift or otherwise by Shah Shumsh-ood-deen was illegal.

This decision is in accordance with the doctrine laid down in the Hidayah Book XV., of wukf or appropriation, Hamilton's translation, page 334, where it is said " wukf " in its primitive sense means " detention." In the language of the law (according to Haneefa) it signifies the appropriation of any particular thing in

such a way that the appropriator's right in it shall continue, and the advantage of it go to some charitable purpose in the manner of a loan. According to the two disciples, "wukf" signifies the appropriation of a particular article in such a manner as subjects it to the rules of divine property, whence the appropriation right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures. The two disciples therefore hold appropriation to be absolute, though differing in this, that Aboo-Yoosaf holds the appropriation to be absolute from the moment of its execution, whereas Mohammed holds it to be absolute only on the delivery of it to a mutwallee (or procurator), and consequently that it cannot be disposed of by gift or sale, and that inheritance also does not obtain with respect to it. Thus the term "wukf" in its literal sense comprehends all that is mentioned both at Haneefa and by the two disciples.

Again, p. 334, it is said, "Upon an appropriation becoming valid or absolute the sale or transfer of the thing appropriated is unlawful according to all lawyers; the transfer is unlawful, because of a saying of the prophet, 'Bestow the actual land itself in charity in such a manner that it shall no longer be saleable or inheritable.'"

If the decision in the case of Kubeer-ood-deen *versus* Mussumat Kadira was correct, it follows that the transfer in this case, whether conditional or absolute, by the same person (Shumsh-ood-deen) to the defendant was illegal. Also, secondly, with respect to the lapse of time, the plaintiff, not being the proprietor, had no right to sue for the recovery of the villages as his own; accordingly he preferred his suit as Sijjada Nashin, having been appointed mutwallee in 1819. Had he succeeded as heir of his father to a proprietary right in the villages, he might have been barred by the lapse of twelve years, according to Section 14 of Regulation III of 1793; but having no right except as mutwallee, he stood in a very different situation. The superintendence of the wukf villages devolved to his care from the date of his appointment only. The mutwallee is the procurator of the donor, which in this case was the sovereign; and it appears by Regulation XIX of 1810, that it is the duty of every Government to provide that the endowments for pious and beneficial purposes be applied according to their real intention; that local agents are appointed to ascertain and report the names of trustees, managers, and superintendents, whether under the designation of mutwallee or any other, and all vacancies, and to recommend fit persons where the denomination devolves on the Government; that the Board of Commissioners may appoint such persons, or make such other provision for the superintendence, management, or trust as may be thought fit. The plaintiff, therefore, upon his appointment as mutwallee, became the authorized agent of the Government for the performance of the acknowledged duty of the Government to protect the endowment from misapplication; for, as it is said in the opinion of the Mahomedan Lawyers, Appendix, page 21, "The endower and the mutwallee are one and the same;" the endowment in this case was a perpetual wukf endowment, and the duty of the Government to preserve its application to the right use was a public and perpetual duty. By Regulation II of 1805, Section 2, it is provided that the limitation of twelve years for the commencement of Civil suits shall not be considered applicable to the commencement of any suits for the recovery of the public revenue, or for any public rights or claims whatever which may be instituted by or on behalf of the Government with the sanction of the Governor-General in Council, or by direction of any public officer or officers who may be duly authorized to prosecute the same on the part of Government. The plaintiff, who was neither heir nor personal representative of his father in respect of wukf property, had no right of action against the defendant till his appointment in 1819, and the defendant could acquire no right against the Government, whose procurator the plaintiff was, at least until twelve years had elapsed from his appointment.

Thirdly, the endowment being a perpetual wukf and the alienation consequently illegal, and it not having been shewn that the purchase-money was

applied to the use of the khankah, the plaintiff cannot be required to account for it, even supposing the defendant not to have been fully repaid by his long possession of the property.

Their Lordships are therefore of opinion that the judgment of the Court of Sudder Dewanny Adawlut ought to be affirmed.

The 24th February 1841.

Present :

Lord Brougham, Lord Denman, Mr. Baron Parke, Mr. Justice Bosanquet,
Dr. Lushington, and Sir E. H. East.

Hereditary Office.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Babun Wullad Raja Kartick,

versus

Davood Wullud Nunnoo.

Dismissal of claim for the exercise of a hereditary office, upheld for want of evidence of any descent of the office in the family of the plaintiff.

Lord Brougham.—THEIR Lordships are of opinion that, considering the evidence in this case, and the whole matters that have been argued before them on either side, the plaintiff below, the present appellant, fails in making out even a *prima facie* case. The evidence taken amounts really to no more than this, that the witnesses, with various degrees of accuracy, two or three of them, particularly the older ones, speak to the exercising of this office by Babun calling him the grandfather of the plaintiff, which mode of speaking respecting Babun and the plaintiff is really the only proof that there is in the cause of the right of the plaintiff, the present appellant. Then, admitting the office to exist, and admitting the office to be hereditary, in which both parties seem to be agreed, there is no evidence whatever of any descent of the office in the family of the plaintiff who now claims it. Their Lordships are of opinion, taking the whole case together, that this is a ground upon which his claim ought to be rejected, and the decision of the Sudder Adawlut Court in the last instance affirmed. That decision reversed the previous decision which had reversed the one before it, which again had reversed the original decision; there were, therefore, two decisions on each side, and their Lordships are of opinion that this is a ground quite sufficient to support the decision of the Sudder Adawlut in the last instance.

Their Lordships do not think it necessary to take into consideration the question with respect to the length of time, except in so far as to observe that the length of time during which the office has been exercised by another party, and not by these parties, explain it how you will, very much strengthens the observation that arises upon the defect of proof on the part of the plaintiff. It is not necessary to consider it as a bar, but as going very much to strengthen the presumption against the case of the plaintiff, which case can only rely upon presumption to a considerable extent admitted in his favor.

Their Lordships also do not think it necessary to say anything respecting the grant by Scindia to Nunnoo, through whom the respondent might be supposed to claim. Their Lordships have no evidence before them of the grant of Scindia; and no evidence of the grant appears to have been before the Court below. If such a grant were made by that authority, it is quite unnecessary to say whether it would or would not have been a valid grant. In all probability it might have been, being a grant by the Supreme Power of the State, in whatever way the office might have been granted before in the family of Babun. But that is not before their Lordships; there is no evidence on the subject, and therefore this affirmance of the decree of the

Court below is wholly irrespective of, and does in no way proceed upon, any grant by Scindia.

Their Lordships, therefore, are of opinion that the decision of the Court in the last resort in India must be affirmed, but nothing said as to the costs of the appeal.

Decree affirmed.

The 24th February 1841.

Present :

Lord Brougham, Mr. Baron Parke, Mr. Justice Erskine, Dr. Lushington, and Sir E. H. East.

Mortgage—Attachment—Partnership.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Jugjeewun-Das Keeka Shah,

versus

Ram-Das Brijbookun-Das.

A mortgage of the revenues of a village was executed by a firm, and the deed stipulated that the mortgagees should station a *mehta* or clerk of their own in the village to make the collections, who was to receive his monthly salary and daily food from the mortgagors whilst the property remained in mortgage. A *mehta* was accordingly appointed, who received the rents and profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for 4 or 5 years. The respondent, who was one of the partners of the firm, did not execute the mortgage, but was cognizant afterwards of the execution of it, and he sued his co-partners and obtained a decree for his share of the assets of the firm. In execution of his decree, an attachment issued against the estate. The mortgagee sues for the removal of the attachment.

Held that the mortgage was valid up to the time of the notice of the respondent's claim (*i. e.*, when he proceeded to enforce that claim by attachment and when he became in the situation of a second incumbrancer); and that, if after that time he permitted the mortgagors to receive any portion of the produce of the estate, he ought, with respect to the monies so received, to be postponed to the subsequent incumbrancer.

Mr. Baron Parke.—THIS is an appeal from a decree of the Court of Sudder Dewanny Adawlut which reversed a decree of the Zillah Court of Surat, and the appellant prays Her Majesty to reverse the decree of the Court of Sudder Dewanny Adawlut, and to affirm the decree of the Zillah Court of Surat.

The question arises principally upon the construction of a mortgage-deed by which the revenues of the village of Muzeegeaum were mortgaged by the firm of Lal Kishen, in which the respondent was a partner, though he did not actually execute the bond.

The revenues of this village were mortgaged upon these terms. An advance had been made by the appellant and another person, not a party to this deed, to the amount nominally of 18,000 rupees, but actually 16,000 were advanced, and that advance was made for the purpose of paying the partnership debts of the respondent and his co-partners, and then the deed was executed by two of the co-partners, upon which the question in this case arises.

By that deed it is stipulated that the village of Muzeegeaum and the house in Surat should be mortgaged for the sum mentioned, 18,000 rupees and upwards. "The profit of this money is settled for 12 annas, on these conditions, that the holders of the mortgage are to receive in redemption the whole of the produce of the said village, about 3,000 or 3,200 rupees, and after allowing for interest, the remainder will go for the purpose of liquidating the principal, and they shall continue so to receive and appropriate the annual produce until the whole of their demand be liquidated. The risk of collecting the income, and of any deficiency in the revenue, is upon our heads, 'that is the mortgagors;' and we do further declare that the holders of the said mortgage shall station a *mehta* or clerk of their own in the said village, for the purpose of making the collections; and we, the mortgagors, so long as this property remains in mortgage, do agree to give him a monthly salary of 5 rupees and his daily feed so long as we can afford to do so."

This instrument was not executed by the respondent, but there is no doubt that it was executed on the partnership account. There is no doubt that he was cognizant afterwards of the execution of this bond, and that he is bound by the contents of that bond, and he must be considered for the purposes of this suit as being a mortgagor.

There has been some dispute as to what was done by virtue of this bond afterwards. Whether or not actual possession was taken of the property,—and their Lordships think the conclusion they ought to come to upon the facts in evidence in the case is, that actual possession was taken by virtue of the mortgage,—it is clear that there was a mehta appointed who was paid by the mortgagors, and who might have received the rents and profits of the village, and he probably did receive the rents and profits of the village for a year or two, but afterwards permitted the mortgagors to receive them for four or five years afterwards.

Now, the question will be, in what way the mortgagee's rights are affected by this conduct ; and that will depend, *first*, upon the construction of the instrument itself. If this is a binding contract,—binding between him and the mortgagors,—binding him to apply the rents and profits to the payment of the debt,—he might be considered as having forfeited his right to payment in consequence of having allowed the mortgagors themselves to take possession of the rents and profits during some of the years during which his mehta was in possession. But their Lordships are of opinion that that is not the true construction of the deed, but that it is merely a power to satisfy himself, just as an English mortgagee may, by taking possession of the rents and profits of the estate ; and if an English mortgagee chooses to forego the benefit of receiving the rents and profits, and permits the mortgagor to take them, it would have no effect as between him and the mortgagors ; he would have a full right to recover his debt by reason of the mortgage. The only effect would be, when some subsequent incumbrancer came in, and he had notice of that claim. In that case the rule and law in England would be that if, after notice, he permits the mortgagor to receive the rents and profits, he exposes himself to the claim of the second incumbrancer ; and that is the principle which their Lordships think ought to be applied to the present case.

That being so, there is no doubt that this transaction was valid up to the time of the notice of the respondent's claim, that is, up to the time when the attachment was served by being delivered to the officer of the village, or in whatever way it was executed ; but until that attachment was executed there was no notice to the mortgagee of any adverse claim on the part of the respondent. The claim did not arise till the suit for the termination of the partnership was adjusted, at which time the estate became the property of the other partners, and the respondent became entitled, by virtue of that decree, to a claim against his co-partners for the amount of 19,000 and odd rupees. When he proceeded to enforce that claim by attachment, he became in the situation of a second incumbrancer, and not before ; and therefore their Lordships are of opinion that, though possession was taken by the mortgagee by means of his mehta, and though he might have received the proceeds of the village from 1819 to 1824 or 1825, yet he is not to be charged in account with more than he actually received during that time. But when the attachment was placed upon the village, he had notice of an adverse claim, and if after that time he permitted the mortgagor to receive any portion of the profits of that estate, then he ought, with respect to the monies so received, to be postponed to the subsequent incumbrancer.

Therefore their Lordships are of opinion that the account ought to be taken upon that principle. The effect of that will be, that it will be clear that the mortgagee is unpaid the full amount of the principal and interest. The principal and interest amount to more than 25,000 rupees from the date of the bond down to the period at which the attachment was placed upon the village. During that period it appears that he had received only between 7,000 and 8,000 rupees, and

therefore there would be a large balance due to him. But then he is to be charged for about two years during which time he permitted the mortgagors, after the attachment was placed, to receive the rents and profits of the village. But still that would not be anything near the payment of the principal and interest due upon the bond.

Their Lordships will give a direction to enable the respondent to enforce his claim against the estate subject to the account so taken, reserving to the mortgagee his claim for the balance against the house in Surat, and also against those who are personally responsible to him for the amount of the money originally advanced, and further also against the proceeds of the estate, as soon as the respondent's debt is satisfied, provided it turns out that the proceeds are sufficient to discharge his debt, and to leave a surplus.

Therefore the form of the minute which their Lordships will make as to the mode in which the account shall be taken is this—"Judgment to be reversed. Account to be taken of the principal and interest due on the mortgage of the village of Muzeegaum, and the sums actually received by the appellant prior to the time when the attachment issued, and that the appellant be charged in that account with the amount which he might have received after the attachment but for his wilful default." If the attachment prevented him from receiving at all, of course he will not be charged, but if the attachment was only initiative, in order to ground an execution upon it, and still permitting the person in possession to receive the rents and profits, and if he has permitted the mortgagor to receive them, he will be charged—so the words will be, "That the appellant be charged with the amount which he might have received after the attachment but for his wilful default; and that, after taking the account, he be permitted to continue in possession of the village until the balance due on that account, with interest, be fully paid; that after the same is paid, the respondent be permitted to proceed under an attachment to satisfy his demand, reserving to the appellant right to come against the balance of proceeds of the estate, after satisfying the respondent's claim, and against the house at Surat, and against such parties as are personally liable to him for the balance of his claim."

Then the only remaining question will be the question of costs. Their Lordships are of opinion that, as it is perfectly clear that he must be entitled to hold the estate for some time to come, he will be entitled to his costs—that is, the costs of the proceeding in the Court below, to be calculated upon the principle adopted in the Zillah Court—that part of the suit was wrong, and part was right; and he will also have the costs in the Sudder Dewanny Adawlut, and the costs of the appeal.

Mr. Lloyd.—Costs out of the estate?

Mr. Wigram.—No. Costs against you.

Mr. Baron Parke.—Personal costs.

Lord Brougham.—The first judgment is set up upon the 10,000 rupees, excluding the other, thinking that he has gone erroneously for the house, and then the costs are given in the Sudder Court, and the costs of the appeal.

Mr. Lloyd.—There is one point which your Lordships will allow me to draw your attention to; your Lordships seemed to state in the minute you read, that the appellant was to remain in possession till he was paid, out of the proceeds of the estate, the amount of the balance found due upon the account. Now, it appears that the respondent was always very desirous to pay off the amount to redeem; your Lordships will give him liberty, upon the balance of the account being ascertained, to redeem and himself to get into possession.

Mr. Wigram.—There is no necessity to specify that; every mortgagor may redeem.

Mr. Lloyd.—Your Lordships will allow that to be introduced into the minute of the decree, because otherwise some difficulty may arise.

Mr. Wigram.—I cannot object, and if I could I would not. It is quite reasonable.

Mr. Baron Parke.—Dr. Lushington says that somewhere in the proceedings it appears that there is a difficulty about doing that.

Dr. Lushington.—The other parties say that they know this cannot be done without the consent of the mortgagors. How far that may be true or false I do not know.

Mr. Jackson.—It was upon the petition presented after the Zillah Judge's decree at page 57.

Dr. Lushington.—It is at page 33—"I agreed to pay the whole of the money, and if the Sirkar will direct me to pay, I have no objection, but without the permission and consent of the mortgagors it cannot take place."

Mr. Baron Parke.—The mortgagor ought to consent. You have no objection to that, Mr. Wigram?

Mr. Wigram.—It is very hard upon the mortgagee that he may not take payment of his debt if he can get it. There may be a question about whom he is to convey the estate to, but I should be sorry, on behalf of my client, that he should not get payment of his debt if he can.

Mr. Baron Parke.—Then we will say, with liberty to redeem the mortgage by payment of the principal and interest.

Mr. Wigram.—With respect to the costs of the appeal, your Lordships give us those?

Mr. Baron Parke.—Yes.

The 2nd July 1841.

Present :

Lord Brougham, Mr. Baron Parke, Sir H. Jenner, Dr. Lushington, and Sir E. H. East.

Adverse possession—Zemindar—Restraint—Ejectment.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Rajah Pedda Vencatapa Naidoo Bahadur,

versus

Aroovala Roodrapa Naidoo and another.

A zemindar has no right to restrain the persons of his officers. If he does so, he is liable to more than merely nominal damages. Nor can the zemindar eject his officers from their house of which they have had long possession, without clear proof of title on his part. In India, the title of possession must prevail until a good title is shown to the contrary.

Mr. Baron Parke.—THEIR Lordships do not think it necessary to trouble the Counsel for the respondents in this case. It appears to their Lordships, who have had an opportunity of considering the ingenious objections that have been made to the decree of the Adawlut, that there is really no sufficient foundation for them; and that they cannot see their way clearly to reversing the present decree.

With respect to the first objection, which was Mr. Miller's last objection, and upon which he reliedt he most, that the proceeding was informal, inasmuch as it was a suit instituted under Regulation XXXII of 1802, and was not brought within the time within which by the construction of this Regulation it ought to be brought,—that is, within a year after the injury sustained,—the Court have already given an answer to that, namely, that that part of the statement in the plaint is really superfluous; and that the plaint having been framed upon the legal title to redress, both for the injury to the person, and for the injuries to the land, and for taking away personal property, and the suit having been subsequently con-

ducted as a regular suit, the objection is wholly unavailing ; that it is improperly stated in the plaint to have been a suit founded upon this Regulation, which is to give redress to persons whose goods have been taken away without their producing a proof of their title. This case has proceeded all along upon the ground of title in the plaintiff, both as to his claim of compensation for personal injury, and for injury done to his land.

Now, let us just examine, very shortly, the different heads according to which compensation has been awarded by the decree of the Sudder ; and it will be found, upon looking at them, that each of the grounds taken in that decree is perfectly well sustained. The first question is with regard to the injury done to the person. There certainly is ample evidence that the plaintiffs below, that is, the now respondents, had their persons put under restraint by order of the Rajah ; and for that restraint there has been an award of three hundred rupees each, which appear to the Court below to be a proper compensation. And we certainly are not in a condition to say that that compensation is improper. It is not merely for the inconvenience which they sustained ; but probably that sum was awarded by way of letting the zemindars know that they ought not to exercise any supposed authority which they had in contravention to the law. There seems to have been an impression that the zemindar had a right to restrain the persons of his officers in case he thought proper so to do ; and to do away that impression, it was right that there should be more than merely nominal damages for that restraint, in order that the zemindars might know henceforth that they could not proceed upon any such supposed custom. It appears, therefore, to their Lordships, that there is no impropriety in the award of the sum of three hundred rupees each, as compensation for the injury which they thus sustained.

The next question is with respect to the damages for ejecting the plaintiffs below, the now respondents, out of their house at Calastray. It appears that both parties proceeded to show their title to this house ; but neither party was able to give satisfactory evidence of title ; and the Court of Sudder say, and say very properly, that the long possession which the respondents have had in the house is a sufficient proof of title in the first instance, and that as the appellant was not able to give satisfactory proof that he has the title in him, the possession on the part of the plaintiffs must prevail ; and that principle is a perfectly just principle. It is for them to judge, who are much more competent to do so than we are, whether the possession under such circumstances as took place in this case was a satisfactory proof of title. Probably in this country, we, who are well acquainted with the customs here, should say that if a servant lived in a house appropriated to a servant, we should rather draw an inference from that that the possession of the servant was the possession of the master ; but the customs and usages in the East Indies may be different in that respect ; and, as the Court have drawn an inference from the possession that that is evidence of title, we are not in a position to say the contrary. We think, in the absence of any proof to the contrary, we must suppose the inference to be correct, that they were possessed in their own right. The principle upon which the Court has proceeded is perfectly correct. The title of possession must prevail until a good title is shown to the contrary. That disposes of the second head of objection.

The third is the claim for the house and garden at Poondy ; and it is insisted that there was no proof, in the first place, that the defendant below, the now appellant, ever took possession of the house. With respect to the garden, there is unquestionable proof ; but I think it will be found in the evidence at page 41, that there was sufficient proof also that the appellant took possession of the house ; and if so, he took possession both of the house and garden without any title ; and we are by no means in a condition to say that the sum which has been awarded as a compensation to the respondents in respect to the occupation of the house and garden is an improper amount.

Then the next is, the large amount of compensation given, namely, eight thousand rupees. The Court below certainly, as well as ourselves, feel that the evidence which has been given upon this subject is somewhat vague and unsatisfactory. The amount demanded in the plaint exceeds twenty-four thousand rupees, and the sum awarded for damages is eight thousand rupees. The Court below had much better means than we have of forming an estimate of what the plaintiffs' damage really was. They have given a much smaller sum than was claimed, and it is enough for us to say that we cannot see that they came to a wrong conclusion. There was unquestionably evidence for their consideration to prove that the Rajah, and other persons by his authority, had seized property to a very considerable amount. It appears clearly from the parol evidence adduced on the part of the appellant, the three witnesses mentioned in this decree, although they have not given satisfactory evidence as to the seizure, yet the general complexion of their testimony shows that the Rajah did seize some of the property belonging to the respondents. The Court, upon this part of the case, do not feel that they have any ground to dispute the propriety of the decision at which the Court below has arrived in awarding the compensation of eight thousand rupees.

The same observation also may be made with regard to the fifth head, under which a small sum has been awarded for compensation for the inconvenience to which one of the respondents was put in appearing before the Magistrate. There does not seem to be any reason why that amount should not be allowed. We think, therefore, upon the whole, that there is no ground for the appeal against the decree, and that the decree ought to be affirmed with costs.

The 6th July 1842.

Present :

The Lord President, Lord Brougham, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir. A. Johnston.

Unauthorized sale by Collector for arrears of Revenue (of whole Talook in one lot)—Unauthorized confirmation of sale by Board of Revenue—Estoppel (Acquiescence of proprietor)—Accounts—Costs.

Maharajah Mitterjeet Sing Bahadoor, for himself, and as guardian of Rajah Mood Narain Sing, Meer Abd-oollah, and Lala Bunwaree Lal,

versus

The Heirs of the late Rancee, widow of Rajah Juswunt Sing, deceased.

The sale by a Collector of a whole talook in one lot for arrears of revenue, without specific authority previously conferred by the Board of Revenue, was held to be an act unauthorized by the general rules and principles of the Regulations, and not rendered valid by the subsequent unauthorized confirmation of it by the Board and by the appropriation of the surplus proceeds of the money by the defaulting proprietor. The proprietor's acquiescence in a sale made, as the proprietor believed, by the authority of the Board of Revenue, did not give legal efficacy to a sale altogether void for the want of such authority or bar the proprietor's claim to annul the sale on that ground.

The Courts below, without entering into any investigation of the profits made by the purchaser during his occupation of the estate, assumed that he had re-imbursed himself the amount of the purchase-money and interest out of the profits of the estate. The Privy Council, however, saw no ground for such an assumption, and directed that an account should be taken of the principal and interest due to the purchaser in respect of the purchase-money paid by him, and also of the net profits made by him out of the estate during his occupation, and that, on payment to him of whatever may appear due to him on taking such account, possession of the talook should be delivered to the proprietor.

The Privy Council further, acquitting the purchaser of all blame in the transaction, reversed so much of the decrees of the Courts below as condemned him in costs, and ordered each party to bear his own costs in all the Courts.

Erskine, J.—THIS appeal arises out of a suit originally instituted in the Provincial Court at Patna, in December 1817, by the late Rancee, the widow of Rajah Juswunt Sing, against the Government of Bengal, and also Maharajah Mitterjeet Sing, (for himself, and as guardian of Rajah Mood Narain Sing), Meer Abd-oollah, Gokul Chund, and Baboo Byjnath Sahoo, for the purpose of annulling the sale of

the talook of Belkhuruh, in the pergunnah of Urol, formerly, the property of the Ranee, but which had been seized for arrears of revenue by the officers of the Government, and by them sold to the appellant, Maharajah Mitterjeet Sing, for the sum of 1,10,000 sicca rupees.

The grounds upon which the sale was impeached by the Ranee were in substance as collected from her plaint. That the sale was the result of a fraudulent conspiracy between the purchaser, Maharajah Mitterjeet Sing, and Baboo Byjnath Sahoo, the cash-keeper of the Government, and Meer Abd-oollah, and also the officers of the Collector. That a larger extent of property than was necessary to produce the arrears due, was put up for sale and sold. And that, for the purpose of enabling the purchaser to obtain the Ranee's property at an inadequate price, the whole of the talook of Belkhuruh had been unnecessarily and improperly put up to sale in one lot, and that the advertisement did not sufficiently apprise those who might be expected to become bidders at the sale, what was the extent and nature of the property to be sold. That the sale having been postponed, no sufficient advertisement of the day fixed for the sale had been published, according to the Government Regulations. And that by these means, property of the Ranee which was worth 5 lacs of rupces had been purchased by the appellant, Maharajah Mitterjeet Sing, for the inadequate price of 1,10,000 sicca rupees.

The Ranee further complained that the purchase was made in fictitious names, and that in reality it was a purchase for the use of the Government officers, contrary to the Regulations, and that the sale was in fact of 210 villages, whereas the advertisement stated it to be of 74 villages only. And further, that the balance of arrears was incorrectly stated; that, in truth, no balance was due for any arrears of the talook that was sold, and that no notice of the advertisement had been given to the Ranee.

After filing her plaint, and before any further proceedings were had, the Ranee died, and the suit was afterwards carried on by her heirs. The officers of the Government put in no answer to the plaintiff's complaint.

After instituting certain inquiries into the circumstances of the sale, the Board of Revenue appears to have come to the conclusion that the sale had been irregularly conducted, and to have wished that the purchaser should give up the estate to the Ranee; but the purchaser having declined to acquiesce in their view of the case, the Government took no part in the defence.

The other defendants, however, having put in their answers, and the pleadings having been brought to a close, a mass of evidence, both documentary and oral, was produced on both sides, and on the 19th of November 1825, the Provincial Court of Patna pronounced its decree, and thereby, after entering into an elaborate detail of all the circumstances of the case, and after stating that the sale was fictitious and contrary to the Regulations, and was made through the collusion and misrepresentation of the officers of the Collector, and after further pointing out certain irregularities in the conduct of the sale and the issue of the advertisements, ordered the sale to be annulled, and that the heirs of the Ranee should obtain possession of the villages in dispute, and that they should pay into the treasury the sum of 2,716 rupees, 6 annas, and 5 gundas, the balance after the receipt of 10,026 rupees, 4 annas, on account of the balance of malguzary, due to the end of Phalgun, with interest.

The decree then proceeds thus:—"And as it is probable that the purchasers have realized more than the price of the sale, with interest, from the profits of the villages in dispute, it is not thought necessary to give any order to return the sale price in this case,—either of the parties who may think there is an excess of money due, may sue to realize it. As the sale was effected by the combination of and misrepresentations of the officers and purchasers, and the Council, upon the report of the Collector, and the letter of the Board, when an answer of Government to the plaint was required, considered the sale improper, and advised the talook to be

returned (with which the purchaser would not comply, and on which account Government refused giving any answer to the plaint of the late Ranee), no blame is attached to Government. The whole costs of both parties are therefore to be paid by the purchasers."

The purchasers appealed from this decree to the Sudder Dewanny Adawlut, and further evidence on both sides was taken in the cause by order of that Court, and on the 29th of May 1832 the Court pronounced its decree, affirming the sentence of the Provincial Court, upon the ground that the sale in dispute was unnecessary and improper, and contrary to the Regulations. And after giving its reasons for this conclusion, the Court proceeds to state as follows:—"But be it not understood that the sale in dispute has been reversed on account of the sale price of the land much exceeding the arrears of the malguzary due by the proprietor, for according to Section 25 Regulation V of 1812, it would not be a sufficient ground to reverse the sale; but be it known that the real ground for the reversal of the sale of the talook in dispute is that, although the jumma of every mehal of the talook was separately entered in the settlement of 1197 Fusly, the Collector did not refer to the Board for a sale of a portion of the lands of the defaulter, sufficient to discharge the arrears due to Government, and it is still more wonderful that, in the advertisement for the sale of the entire talook, the name and jumma of each mehal belonging to it was not mentioned, as ordered by the Regulations, and in consequence of which omission a great loss has been sustained by the respondent."

It was therefore ordered that the decision of the Provincial Court should be in every respect affirmed, and all the costs be payable by the appellant, and the respondent be put in possession immediately on paying sicca rupees 2,716-6-5, the balance due to Government with interest.

Against these decrees the purchasers appealed to the Queen in Council, and Her Majesty having been pleased to refer the case for hearing before the Judicial Committee, it was fully and very ably argued here on the 7th and 11th December last, before the Lord President, Lord Brougham, the Judge of the Admiralty, and myself. And upon the argument, the learned Counsel for the respondent, feeling that the facts proved in the Court below would not enable them to support the decrees appealed from, on the ground either of fraudulent combination between the purchasers and the Collector, or upon their plea that the sale was fictitious, or that the purchase was made on behalf of Government officers, very properly abandoned those untenable positions; for their Lordships are satisfied, after a careful examination of the evidence, that no such case was made out by the respondents.

But it was upon the argument strongly urged that the sale had been justly annulled, upon the ground that the sale of the whole talook, and especially the sale of it in one lot, was unnecessary and improper, and contrary to the Regulations and without the sanction of the Board of Revenue, and that the advertisements were insufficient in point of form, and had not been properly issued or served.

A short summary of the facts proved will render clearer the view which their Lordships take of the questions before them.

It appears that the talook in question consisted of 210 mouzas or villages, of which 85 were original or principal villages called asli, and 125 were dependent villages or hamlets called dakhili, but these 210 villages were classed for fiscal purposes under the names of 74 of the villages, and a separate sum called the sudder jumma was, by the settlement of 1197 Fusly, assessed upon each of these 74 fiscal villages, the total amount of which was sicca rupees 24,748-11-10. This constituted the sudder jumma of the whole talook of Belkharuh.

Besides this talook of Belkharuh, the Ranee was also the proprietor of four other talooks in other pergunnahs, the assessments for which were entered in the same form, namely, by placing a sudder jumma opposite the several fiscal villages of each talook, and placing the sum total of these jummas as the sudder jumma of

the respective talooks, making the sudder jumma of all the five talooks to amount to sicca rupees 41,451, 4 a. 15 g., which was the amount of revenue payable yearly by the Ranee in respect of these five talooks.

It appeared by the evidence, and by the admission of the parties, that, prior to the year 1801, separate kubooleuts or leases were made in respect of each of the fiscal villages composing the several talooks abovementioned; but that, in the year 1801, in consequence of the inconvenience arising from such an arrangement, the different zemindars were required to furnish a general kubooleut and kistbundy for the whole of their villages, and it was notified to the different zemindars that the several adjoining villages composing a zemindary, or held by one individual, were to be considered as one joint estate, and that all the villages of a proprietor would be included in the name of the principal village as one talook.

In pursuance of this requirement and notice, the Ranee, by her agent Puhulwunt Sing, on the 24th of October 1801, executed a kubooleut, by which he undertook, on behalf of the Ranee, to continue to pay the sum of 41,451 rupees, 4 annas, and 15 gundas, the jumma khiraj or assessment of the villages of the pergunnahs Urol, Mussoora, Shalpoor, Mittam, Sanda, and Gah, that being the annual jumma fixed at the Decennial Settlement, and declared that if she should not pay the instalments monthly, according to the deed of instalment, the whole of her property and possessions might be sold at the discretion of the chief authorities, and the balance realized. And in a schedule to this instrument, the names of the seventy-four fiscal villages, with the several assessments to each, are inserted, headed by the name of the pergunnah Urol, with the sudder jumma of such assessments, followed by a similar list of the other villages and assessments, arranged under similar headings, of the names and sudder jumma of the other pergunnahs to which they respectively belong.

It further appeared by the evidence that, in the month of February 1815, there was an arrear of revenue due to Government from the Ranee, in respect of these five talooks, to the amount of sicca rupees 12,742-10-5, and that, upon the 2nd of May 1815, the Acting Collector at Behar published an advertisement for the sale of Belkharuh on Monday the 5th of June at the Collector's sudder cutcherry at Bankipoor, in which the property to be sold was thus described :—1. Mahal Belkharuh. 2. Malguzar, Ranee of the deceased Rajah Juswunt Sing. 3. Sudder jumma, sicca rupees 24,748-11-6. 4. Pergunnah Urol. 5. Village for sale, Belkharuh, and seventy-four mouzas. 6. Balance due to Government, sicca rupees 12,742-10-5. Evidence was given of the service and distribution of this advertisement, the insufficiency of which, however, formed one of the subjects of complaint by the Ranee, to which it will be necessary more particularly to refer.

It appears that the estates of other defaulters had been advertised for sale on the same 5th of June; but before that day arrived, orders were received by the Collector from the Board of Revenue, that, with a view of affording to the Malguzars in arrear a further indulgence in respect of time, the sale should be deferred until the 22nd of that month.

No public notice of this postponement had been given before the 5th of June, and a number of persons having assembled on that day expecting a sale, the Acting Collector caused it to be made known to the persons present that the sale was postponed till the 22nd of June, and another advertisement was prepared and delivered for distribution in the following form:—"5th June 1815. Before this, advertisements were published, dated 2nd of May 1815, that the villages of the pergunnahs of Zillah Behar, mentioned in the said advertisements, would be sold on Monday the 5th of June 1815, agreeing with the 13th of Jeyt 1222 Fusly, for arrears of the Government malguzary, but that the sale would be suspended from this date until the 21st June 1815, according to the orders of the Board of Revenue, and that the sale would take place on Thursday the 22nd June 1815, agreeing with the 1st of Asarh 1222 Fusly, at Bankipore, of the villages mentioned in the said advertise-

ment, according to the conditions mentioned in the advertisement. Notice is therefore given that purchasers attend the sale on the 22nd of June of the said year at the sudder cutcherry at Bankipore, and purchase, and if the villages are sold for the arrears, they purchase them on the conditions specified in the former advertisement."

Notice of the postponement was publicly given to the several persons attending for the expected sale, amongst whom was Chuman Lal, the agent of the Ranee, who had herself applied for a postponement of the sale.

A copy of this advertisement was affixed to the cutcherry at which the sale was to have taken place, and copies of the advertisement were affixed at the different Courts in the district, but no copy of this advertisement was served on the Ranee herself, or affixed upon any part of the estate. On the 22nd of June, the talook of Belkhurh was put up to sale in one lot, and sold to the agent of Mitterjeet Sing for the sum of 1,10,000 sicca rupees, which sum was afterwards, and before the 29th of June, paid into the treasury. On the 29th of June, petitions were presented by Mitterjeet Sing, Gokul Chund, and Meer Abd-oollah, stating that the estate had been bought by Mitterjeet Sing, as to one-half, for his son Baboo Mood Narain; as to one quarter, for Gokul Chund; and as to the remaining quarter, for Meer Abd-oollah; and praying that their names might be inserted as proprietors, according to their several proportions.

On the 4th and 6th of July, petitions were presented by the Ranee, complaining of the sale, and praying that it might be annulled, which were laid before the Board of Revenue; and that Board, after receiving a report from the Acting Collector, to whom the two petitions were referred for an explanation by a letter from their Acting Secretary* to the Acting Collector of Behar, dated the 15th of August, declared that the Board was satisfied with the explanation relative to the sale of the estates of the Ranee of the Rajah Juswunt Sing, and considered the sale legal, and accordingly confirmed it: but, owing to circumstances which it is not necessary particularly to mention, possession was not given to the purchasers until the month of March 1816.

It further appeared by evidence, satisfactory to their Lordships though the fact was disputed by the respondents, that the balance of the purchase-money (after deducting the arrears of duty for which the sale was made, and the costs of the sale) was, from time to time, appropriated by the Ranee to the payment of arrears of tribute due from her in respect of other property, and that at the time of the commencement of the suit now under appeal, there remained the sum of 77 rupees, 9 annas, 10 gundas only unappropriated, and that this small balance was afterwards applied by her to the like purposes.

Under these circumstances, it was contended, on the part of the appellant, that the sale of the whole talook was strictly correct according to the fair import of the Regulations then in force, and that the advertisements were issued and published agreeably to the form prescribed by the Regulations. That even if more than was necessary had been erroneously sold by the Collector, and if the form and publication of the advertisements had been defective, the sale could not be thereby invalidated; and that at all events neither the Ranee nor her heirs could now claim to have the sale annulled on such grounds, since the Ranee had, by appropriating the purchase-money after it had been paid into the treasury by the purchaser, adopted and ratified the sale, and waived all irregularities in the conduct of it; and still less could any irregularities in the form or service of the advertisements supply any ground for annulling the sale after such appropriation of the price.

The respondents, on the other hand, insisted that, as the power of the Collector to sell was a qualified power, the purchaser could only maintain his title under the sale by showing that the power had been duly exercised, and they denied that there was any sufficient evidence of any appropriation of the price by the

Ranee, and asserted that if there was, it could not give efficacy to a sale which was made in defiance of her protest and resistance, and contrary to law.

The first question, therefore, which their Lordships have had to consider is, whether the sale in one lot of the whole talook for arrears of tribute, which might have been paid off by the proceeds of some definite portion of the talook, was within the scope of the Collector's authority. For if the Collector had no authority to sell the whole talook under the circumstances as they stood at the time of the sale, their Lordships' assent to the argument of the respondents' counsel, that no implied adoption of the sale by the subsequent appropriation of the price, will bar the Ranee from reclaiming her estate on the restitution of the purchase-money. The power of the Collector to sell the talook depends upon the different Regulations referred to in the argument, and which are set out in the Supplemental Appendix to the case. The Regulations of 1793, Regulation XIV, after requiring certain preliminary steps, not relevant to this inquiry, declare that the lands of defaulters are liable to seizure and sale by the Collector (without legal process in any Court of Justice) for the discharge of arrears of revenue, but only under the sanction of the Governor General in Council, previously obtained upon the report of the Collector, and the recommendation of the Board of Revenue, who are to recommend the sale of such a portion of the estate of the defaulter as may be sufficient for the liquidation of the amount.

By Regulation III of 1794, Section 5, the Collector is required to submit to the Board of Revenue a statement of such lands of the defaulter as he may think it advisable to have sold to make good the arrears. And the Board of Revenue is authorized to cause the lands specified in such statement, or any other lands belonging to the defaulter, to be advertised for sale, and to report the same; but still the sale was not to take place without the previous sanction of the Governor General in Council.

By Regulation V of 1796, Section 2, the Collector is directed to be careful to select for sale, such land as from the current value of similar lands may appear likely to sell for the amount to be recovered by the sale, and no more.

Now, taking these Regulations together, they declare the power of the Governor in Council to sell the lands of any defaulter for the payment of the arrears of revenue, but also declare that the Governor General will only proceed upon the recommendation of the Board of Revenue, to whom the Collector is to report, not only the arrears, but also the lands which, in his judgment, ought to be sold for the liquidation. But in forming that opinion, the Collector is required to be careful to select such lands as may appear likely to produce the amount of the arrears, and no more. And then, in order to protect the proprietor from the consequences of any miscalculation on the part of the Collector, the 3rd Section of Regulation V of 1796 proceeds to direct that, where the lands put up to sale consist of distinct mehals, separately assessed for the public revenue, they are to be sold in distinct lots, or, though not separately assessed, if they be of considerable extent, and may be readily divided into distinct lots, they are to be divided and sold; and then provides that so many distinct lots only shall be sold as may be necessary to produce the amount of the arrears and the costs.

But, where the lands are put up in one lot, the whole is to be sold, whether the amount bid for them be more or less than the sum due, and the overplus, if any, paid to the proprietor.

By Regulation VII of 1799, the sale of the land of defaulters is only to take place once a year, and in the interval the Collector is authorized to attach the lands of the defaulters, and at the close of the year, by the 5th Clause of Section 23, he is required to report to the Board of Revenue the amount of the arrears, and at the same time to transmit a statement of the lands for sale, sufficient to make good the arrear and the interest thereon to the time of sale, to be disposed of according to the rules prescribed for public sales on account of arrears of revenue.

But by Section 30 it is declared that the Board of Revenue are thereafter to conduct the sales of land in the mode prescribed by the Regulations, without any reference to the Governor General in Council, except in cases where they require his instructions, and they are required to be particularly attentive to the proper selection of lands for sale by the Collector.

The effect of this alteration is worthy of attention ; for as before this time no sale of any lands for the arrears of revenue could take place without the sanction of the Governor General in Council, and as the Governor General in Council claimed and exercised an indefeasible right to sell the whole or any portion of a defaulter's land for arrears of revenue, it followed that no sale of land for such purpose, under the sanction of the Governor General in Council, could be invalidated, on the plea that too much had been selected by the Collector.

But as, by the Regulation last referred to, the Board of Revenue are authorized to conduct the sales in the mode prescribed by the Regulations, without reference to the Governor General, it would follow that the sale in question which was made without any reference to the Governor General in Council, could only be sustained under the Regulation, by showing that it was sanctioned by those former Regulations.

By Regulation I of 1801, Section 6, after reciting that the unqualified operation of the rule established by Section 2 Regulation V of 1796, had been found prejudicial to the public interests in the sub-division of small estates, as well as to the proprietors of such estates, by parcelling them into lots so inconsiderable as to prevent a competition for the purchase of them, and after authorizing the Board of Revenue, if they should judge it advisable, to sell in one lot any entire estate, of which the annual assessment did not exceed 500 sicca rupees, the Board of Revenue is thereby authorized, whenever the amount to be recovered by a sale of land shall bear such proportion to the computed value of the whole estate as may be calculated to leave only an inconsiderable surplus on the sale of the entire estate, to sell the entire estate in the manner prescribed by the Regulations, though the total annual assessment should exceed the sum of 500 sicca rupees, above limited. In such cases, the value of the lands for sale is to be computed from the best information procurable of their produce and extent, compared with the amount of the assessment upon them, and the current value of similar lands. And by Section 7 it was provided that the rule in Section 3 Regulation V of 1796 was not meant to require the division and distinct allotment of a pergunnah, or turruf, or other established local division; that, on the contrary, all established local divisions of known limits were, as far as possible, to be preserved entire in every public sale of land, and to regulate in general the sub-division of landed property, when an estate may be divided at the public sales, and a portion disposed of as a distinct estate.

If the authority vested in the Board of Revenue had stopped here, it would have been necessary to show, not only that the sale of the whole talook of Belkhurrah had been made by the directions of the Board of Revenue, but also that such sale was authorized by the terms of the 5th and 7th Sections of Regulation I of 1801, last referred to. But by Regulation V of 1812, Section 24, it is declared that the consideration of, and decision on, the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it, resides in the Board of Revenue and Board of Commissioners respectively, subject to the control of the Government.

And by Section 25, after reciting that no means existed by which any certain or accurate computation could be formed *a priori* of the real value of any estate or portion of estate, it was declared that sales made at public auction for that purpose were not liable to be annulled by the Courts of Judicature, on the ground that the proceeds of the sales have materially exceeded the amount of the arrears due from the proprietor of the land to Government, and that the Board of Revenue

and Commissioners would be guided by their own discretion, subject, of course to any instructions from the Governor-General in Council.

By Regulation XVIII of 1814, Section 2, it was enacted that, whenever any portion of an instalment of revenue payable in any month remained undischarged on the 1st of the following month, the Collector might forthwith, or at any subsequent time (that arrear remaining undischarged), either after service of a written demand, or without such demand, advertise lands, the property of the defaulter, for public sale, without first submitting a statement of those lands for the previous sanction of the Board of Revenue, or Board of Commissioners, supposing the land so advertised to constitute an entire estate or the whole of the defaulter's right and interest in a joint estate. But in such case he was to report the same to the Board of Revenue, or Board of Commissioners, and to await the Board's sanction, and on no account to proceed to the actual sale of the lands without the express sanction of the Board; subject to a proviso for apportioning the jumma in cases in which the lot proposed to be sold constituted only a part of the defaulter's property in an estate.

By Section 4, the Board of Revenue are directed, on receipt of the Collector's report of his having advertised lands for sale, or on receipt of any statement of land proposed by him for sale, to proceed, without reference to the Governor-General in Council, to determine whether the sale shall take place.

This was the last Regulation passed upon the subject before the date of the sale in question. At that time, therefore, the law stood thus,—the discretionary power of deciding whether the whole of a defaulter's lands, or any or what portion of them, should be actually sold to pay the arrears of Revenue, which was originally vested in the Governor-General in Council, was transferred to the Board of Revenue and Commissioners, subject nevertheless to the control of the Governor-General in Council, whenever he thought fit to interpose in his executive capacity.

But in order to assist the Board in this decision, and to prevent delay, it was the duty of the Collector, whenever any revenue fell in arrear, to report the amount of it to the Board of Revenue, or Board of Commissioners, and, either before or after advertising a sale, to send a statement of the particular land of the defaulter which he proposed should be sold to pay off the arrears, but the Collector was in no case to proceed to an actual sale without the express sanction of the Board.

The fact to be ascertained, therefore, with respect to the first question, is whether the Board of Revenue had, before the disputed sale, sanctioned the sale of the whole talook of Belkharuh, for the liquidation of the arrears due from the Ranee.

Now, it appears from the evidence that, on the 24th of April 1815, the Collector reported to the Board of Revenue that he had advertised certain lands for sale on the 5th of June then next, and transmitted an abstract statement of the lands in Zillah Behar proposed to be sold, for the recovery of arrears of revenue due to Government up to the 1st of Phalgun, that is, to February and March 1815. But although the Collector in this letter states that he had advertised for sale, the lands mentioned in the abstract, there is no evidence in the proceedings of any advertisement of any lands of the Ranee having been published before the 2nd May following, at which date the advertisement already referred to was published. Although this advertisement specifies in the margin that 74 mouzahs were to be sold for the payment of the balance due to Government, of sicca rupees 12,742-10-3, and states that the sale was to take place in conformity with the order of the Board of Revenue, yet there are no traces in the evidence of any previous notice having been forwarded to the Board of Revenue, of the specific lots that it was proposed to put up for sale, and the abstract contained in the Collector's letter of the 24th of April gives no such information to the Board,—neither indeed do the Regulations require that such notice should be sent previous to the advertisement; and as the date of the order of the Board of Revenue is not stated in the advertisement, there is no

reason for concluding that any such authority had at that time been given for the sale of any specific lands, for realizing the arrears due from the Ranee; and there is no evidence of any communication to the Board of Revenue, of the intention of the Collector to sell the talook of Belkhurh in one lot for that purpose. There is no direct proof, indeed, that the advertisement was ever forwarded to the Board before the sale; and if it had been, without further explanation it would not have apprised the Board that the 74 mouzahs proposed to be sold constituted the whole of the talook, or that the sale of any definite portion would be sufficient to cover the amount of the arrears; neither is there any trace in the evidence that the Board of Revenue at any time before the sale had actually given authority to the Collector to proceed to the sale of the 74 mouzahs in one lot.

It may be indeed fairly assumed that the Board had been informed that the Collector had advertised for sale the 808 mouzahs mentioned in the abstract of 24th April 1815, and that the sale of those mouzahs generally had been sanctioned by the Board, because it is stated that the sale of those estates had been postponed from the 5th June to the 22nd July by the order of the Board—a statement sufficiently sanctioned by the subsequent confirmation of the sale. But there is not only no direct proof of any specific authority from the Board of Revenue, to sell the whole talook in one lot, but there is not even a statement by the Collector that any such authority had been given. On the contrary, the statement by the Collector leads to the inference that none such had been received by him,—for in his report, Appendix, page 95, in answer to the Ranee's complaint that the whole talook had been sold in one lot, he does not plead the specific authority of the Board, but the known general principles of the Regulations, as his justification for having so conducted the sale; a justification amply sufficient if true, for it is only when the general directions of the Regulation are departed from, that the specific directions of the Board can be required.

But as has been already shown by Regulation XVIII of 1814, Section 11 (Supplemental Appendix, 33), the Collector is expressly forbidden to proceed to the actual sale of lands advertised, without the express sanction of the Board, to whom by the previous Regulation of 1812 was entrusted the consideration of and decision on the expediency of selling the entire estate, or of disposing in the first instance of any particular part of it. And even by the earlier Regulations of 1796 when the Collector, as it should seem, conducted the sale upon general rules laid down by the Governor-General in Council, without any specific directions on any particular sale that fell within the scope of the general rules, he was bound to select for sale such lands as from the current value of similar lands might appear likely to sell for the amount to be recovered by the sale, and no more. And the spirit and tone of the whole Regulation require that where there are separate assessments upon definite portions or divisions of the property, the property should be put up to sale in separate lots, unless it should be the wish of the proprietor, or for his obvious benefit, that the whole estate should be put up in one entire lot, in which case the whole was to be sold, and the surplus paid over to him.

A reference to the Regulations, therefore, shows that the plea urged by the Collector was unfounded, while the adoption of that plea proves that he had no express direction on the subject, and that he acted without any sufficient legal authority.

Other Regulations were passed after the date of the sale, some of which having a retrospective operation, were cited in the argument. But none of them materially affect the question now under consideration, although one of them tends to confirm the view which has already been taken of the effect of former Regulations. The provision alluded to is in the 3rd Clause of Section 6 of Regulation XI of 1822, by which it is declared that no sale, whether made before or after the promulgation of that Regulation, shall be liable to be annulled, on the ground of informality or omission in the communications that may have passed between the Collector and

the controlling Board, provided that the Board shall have actually given authority to proceed to the sale of the specific lot sold. Now, for the reasons already given, this Clause will not protect the sale in question, and its terms seem to imply that previous authority by the Board to proceed to the sale of the specific lot sold, was essential to the validity of all sales.

In the course of the argument, much reliance was placed upon the *kuboolcut* executed by the Ranees agent by which she subjected the whole of her property and possessions to sale, for any arrears that might be due. But this *kuboolcut*, which was executed on the 24th of October 1801, was given at a time when by the Regulations the Board of Revenue itself had only a limited power in the sale of an entire estate, and the *kuboolcut* purports at the most to give a more extended power to the Board; for the words "chief authorities" could not fairly be taken to vest any discretion in the Collector. But as at the date of the sale, the Board of Revenue had, as we have seen, legislative authority for the exercise of an unlimited discretion, no additional sanction could be acquired for the Board from this *kuboolcut*, and none is given by it to the Collector.

From the whole evidence in the case, therefore, their Lordships are of opinion that the sale by the Collector of the whole talook in one lot was an act unauthorised either by the general rules and principles of the Regulations or by any specific authority previously conferred by the Board of Revenue.

It remains, therefore, to be seen what effect ought to be given to the subsequent confirmation of the sale by the Board, and the supposed adoption of it by the Ranees. In considering the effect of the subsequent confirmation of the sale by the Board, it must be remembered that the Board had not the supreme but only a delegated authority, and that by the terms in which that authority was conferred they were expressly required to exercise their discretion before the sale took place, and that there is no power conferred on them to adopt and confirm an unauthorised sale by the Collector.

As their Lordships, therefore, are of opinion that the sale was illegal and void in the months of June and July, so they think that it was not rendered valid by the unauthorised confirmation of it by the Board of Revenue in the month of August. This would clearly be the case in respect of any sale since the promulgation of Regulation XI of 1822, by the express provisions of Section 25. But, as that Section is not retrospective, no authority can be derived from it in this case, but the principle which dictated the Regulation will supply the rule without it. And although their Lordships would have been prepared to hold that all more irregularities in the improper and unnecessary sale of the whole talook in one lot, in the form of the advertisement, and the manner of their service, had been sufficiently weighed by the Ranees when she appropriated the surplus purchase-money to her own purposes, so as to deprive her of all claim to annul the sale on the ground of such irregularities; yet their Lordships cannot consider the Ranees acquiescence in a sale, made, as she had every reason to believe, by the authority of the Board of Revenue, as giving legal efficacy to a sale altogether void for the want of such authority. It is true that this case is also provided for by the Regulation of 1822, Section 27; but this Regulation does not in terms refer to cases of money received before the promulgation of that rule, and in justice ought not to be so extended; and though as a positive Regulation it may be considered as an useful amendment of the law, there is no known general principle of law upon which such a rule could be held to exist independently of express enactment.

Their Lordships, therefore, feel themselves constrained to uphold the judgment of the Court below, so far as they annul the sale of the talook.

But their Lordships cannot approve of the manner in which those Courts have disposed of the pecuniary questions between the parties, either as to the purchase-money or the costs. In the view that their Lordships have taken of the case, the appellant stands wholly free from blame; he purchased the talook at a public auc-

tion, which to all appearances was regularly held under the sanction of the proper authorities ; he paid the purchase-money into the treasury, and, after some delay, got possession of the estate. The purchase-money was appropriated in part to the payment of the arrears due from the Ranee in respect of that estate, and as to the residue, applied by the Ranee herself to the payment of other arrears due from her upon other accounts. The Court below, without entering into any investigation of the profits made by the appellant during his occupation of the estate, has assumed that he had reimbursed himself the amount of the purchase-money and interest out of the profits of the estate.

Their Lordships see no ground upon which the Court could found such an assumption. According to the Ranee's account, the talook for some years before the sale had not enabled her to pay the revenue, and there are no facts stated to show that it had been more productive in the hands of the appellant. Their Lordships, therefore, are of opinion that an account should be taken of the principal and interest due to the appellant in respect of the purchase-money paid by him into the treasury, and also of the net profits made by him out of the estate during his occupation, and that upon payment to him, by the respondents, of whatever (if anything) may appear to be due to him on taking such account, possession of the talook should be delivered to the respondents. And as, in their Lordships' view of the case, the appellant stands acquitted of all blame in the transaction, their Lordships think that so much of the decrees of both the Courts below as condemn the appellant in costs should be reversed, and that each party should bear his own costs, both in the Courts abroad and in this country, and they will advise Her Majesty accordingly.

Mr. Jackson.—Will your Lordships allow me to observe, that there is an allegation of improvements on the property ; the allegation is, that the purchasers have expended very large sums in improvements : I trust your Lordships will direct all just allowances in respect of improvements.

Mr. Justice Erskine.—Certainly, that is fair matter of allowance.

The 6th July 1842.

Present :

Lord Brougham, Lord Campbell, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

Limitation—Distant Residence.

Sheikh Imdad Ali and others,

versus

Mussumat Kootby Begum.

Where the party in possession of an estate is a *bona fide* purchaser for valuable consideration without notice, and the real owner had neglected for 25 years to assert her right to the estate, mere distant residence was held not to be a sufficient cause to preclude the owner from making an earlier assertion of her right so as to save her from limitation by bringing her within the exceptions of Section 14 Regulation III. 1793 and Section 3 Regulation II. 1805.

Erskine, J.—THE original proceedings in this case were instituted by the present respondent, Mussumat Kootby Begum, in the Provincial Court at Patna, to recover 64 shares out of 160 shares of an *altumgah mehal*, in the *zillah* of Patna, comprising several villages, which she claimed as her inheritance, derived from her mother, Mussumat Saleha Khanum, the widow of Nawab Enayet Khan.

In the Court below two questions were raised and decided : *first*, whether the *mehal* in question was originally the estate of the Nawab, or of his widow, Saleha Khanum ; and *secondly*, and whether the claim of the plaintiff, Kootby Begum, had been barred by lapse of time, according to the Bengal Regulations.

The Provincial Court, without giving any opinion upon the first point, dismissed the plaintiff's suit, with costs upon the ground that, whatever her right might have been, her remedy by suit was barred by lapse of time, and that her claim was not entitled to a hearing by the Court.

Against this decree the plaintiff appealed to the Sudder Dewanny Adawlut, and that Court, after hearing the appeal on the 31st December 1831, decided, *first*, that the villiges in dispute had been proved to have been the property of Saleha Khanum, and that the plaintiff, as her daughter, was entitled to one-half as her inheritance; and, *secondly*, that, although as to some of the villages the claim of the plaintiff had been barred by lapse of time, as to the rest, her remedy had not been taken away by the Regulations relied on. The Court therefore modified the decision of the Provincial Court by affirming its decree as to a part of the estate, and decreeing to the plaintiff the remainder, and apportioning the costs between the parties.

The present appellants, who had defended the suit below, as purchasers, were dissatisfied with this decision of the Sudder Adawlut, and appealed to the Queen in Council against that part of the decree that affirmed the plaintiff's right to recover a portion of the property claimed by her; and Her Majesty having been pleased to refer such appeal to the Judicial Committee, the case was argued before Lord Brougham, Lord Campbell, the Judge of the Admiralty, and myself; when, on the part of the appellants, it was insisted that, whatever might have been the original title of the plaintiff below, her right to recover any part of the property had been altogether barred by the lapse of time, and that the decree of the Provincial Court ought to have been wholly affirmed. Their Lordships acquiesce in this conclusion, and are of opinion that the decision of the Provincial Court was right, and that the decree of the Sudder Adawlut, modifying it, is wrong.

In order to explain the ground upon which their Lordships have founded this opinion, it will be necessary to refer more particularly to the facts established by the evidence, and to the language of the Regulations upon which the question arises. It appeared by the evidence that Saleha Khanum was the wife of the Nawab Enayet Khan Rasikh, and that they had three children, two sons and one daughter. It is clearly proved by the admissions of those under whom the appellants claim as purchasers, as well as by other evidence, that the mehal in question was the property of Saleha Khanum, and that she, having survived her husband, held possession of it until her death in 1801.

The two sons died in their mother's life-time; the daughter, the present respondent, and the plaintiff below, was living with her mother at Paniput at the time of the mother's death. The eldest son, Izzat Oollah Khan, had died without issue. Hafiz Oolla Khan, the second son, had died only a few months before his mother, and had, down to the time of his death, managed the estate for his mother. He left three children, two sons and one daughter. Under these circumstances, by the Hindoo Law of Inheritance, the plaintiff below became entitled to one-half of her mother's property, and the other half would descend to the children of her brother Hafiz. These children were Kulb Ali Khan, Amin Oolla Khan, and Mussumat Gusety Begum. Upon the death, however, of Saleha Khanum in 1801, Kulb Ali Khan and Amin Oolla Khan took possession of the whole of the estate, and dealt with it as if it were entirely their own, and, until the year 1812, neither their aunt nor their sister preferred any claim to any part of the inheritance.

On the 4th of March, in the year 1812, Mussumat Gusety Begum, the sister, instituted proceedings in the Patna Provincial Court against her two brothers, to recover a fifth share of the mehal, and by the decree of the said Court, which was afterwards, in the year 1828, confirmed upon appeal by the Sudder Dewanny Adawlut, she recovered one-fifth of the whole estate as her share of the inheritance from Saleha Khanum. It is to be observed that the claim of the

sister, and the resistance on the part of the brothers proceeded on the assumption that the whole inheritance had descended from Saleha Khanum to the children of Hafiz Oolla Khan, and that no allusion was made, in the course of the suit, to any claim of their aunt, the present respondent, although her name is stated to have been registered in the Collector's office. It appeared that, long prior to the commencement of this suit, namely, in the year 1801, Kulb Ali Khan had settled one-half of the property, which he claimed as his share, upon his wife, Beejy Begum, and Amin Oolla Khan had, in 1805, transferred his share to his son Azim Oolla Khan; but neither of these transfers appears to have been acted upon farther than by having the names recorded in the Collector's office, and the two brothers had continued to deal with the property as their own. For in the year 1807, Kulb Ali Khan, acting for himself and his brother, sold a part of the estate to Baboo Byjnath Jahoo, and although, in the years 1813 and 1814, Beejy Begum assumed the power of selling portions of the estate, there is no evidence that Azim Oolla Khan ever acted as owner of any part of the estate under the alleged transfer to him, but, on the contrary, Amin Oolla Khan, his father, continued to dispose of the estate as if no such transfer had been made, and the appellants, at the trial below, rested their claim entirely upon purchases made from Beejy Begum and Amin Oolla Khan. The dates of those sales, as proved in the progress of the suit were in the years 1813-1814, within twelve years from the commencement of the respondents' suit, and these dates formed the foundation of the decree of the Sudder Adawlut, which decided that the plaintiff's remedy had been barred as to Mohi-ood-deen, sold by Kulb Ali Khan in 1807, more than twelve years before the commencement of the suit, but was not barred as to the residue, which did not appear by the evidence to have been sold before the years 1813 and 1814.

After the decree had been pronounced, the appellants petitioned to have the cause heard again, and to be allowed to put in evidence other deeds to prove that, as to another portion of the estate, the remedy of the plaintiff had been barred by a sale beyond the twelve years, namely, in 1812, to Boorham Ali Khan, from whom the appellants purchased that portion in 1824. The Court, however, refused, and, we think, properly, to re-open the case for the purpose of admitting evidence which ought to have been produced in the first instance, and there is no appeal from that refusal; and the question, therefore, for decision is whether, under the circumstances of the case, the remedy of the plaintiff had been barred by the adverse possession of Kulb Ali Khan and Amin Oolla Khan from the year 1800 to 1825.

The answer to this question depends upon the construction of the Bengal Regulations, namely, Regulation III. 1793, Section 14, and Regulation II. 1805, Section 3. By Regulation III. 1793, Section 14, Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever against any person or persons if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can shew by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand or promised to pay the money, or that he had directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress.

Now, in this case, the plaintiff's cause of action arose twenty-five years before the commencement of this suit, and no other suit was ever instituted by her on account of it. Her claim, therefore, is clearly barred, unless she can by proof bring herself within one of the exceptions. The only exception under this Regulation from which any protection has been claimed is the last, namely, that

she has been precluded from obtaining redress by a good and sufficient cause, and the cause relied on is the distance of her residence from the estates in dispute and from the tribunal before which alone she could have preferred her claim. It appears by the evidence that the plaintiff lived at Paniput, several hundred miles from Patna; but as this distance is 1,800 could have afforded no greater impediment to the appointment of a Mookhtar to enforce her rights than it did in 1825, the only way in which it can be said to have precluded her from obtaining redress would be by keeping her in ignorance of the manner in which her rights had been usurped by her nephews; but it must be remembered that her mother died at Paniput, and that her right to one-half the estate devolved upon her immediately upon her mother's death, and that her not receiving any remittances on account of the estate must have afforded sufficient notice to her that some one must be usurping her rights, and this not for one or two years only, but for a series of more than twenty years, during which time she appears to have made no inquiry, nor to have instituted any proceeding to assert her claim, but permitted her nephews to hold themselves out to the world as the sole owners of the estate.

When, therefore, the question arises between the purchasers of an estate, from persons who had been thus permitted to hold themselves out to the world as the proprietors for more than twelve years before the purchase, and an owner, by whose neglect they had thus been enabled to assume the character of proprietors, the Court ought to have some other facts than mere distant residence to make out the proof of some good and sufficient cause that had precluded an earlier assertion of a right that must have been well known to the claimant from the beginning. The appellants had every reason to assume that the two nephews were the owners, not only from their long and undisputed possession, but also from the circumstance that when a claim to some share was, in the year 1812, asserted by the sister, no suggestion of the plaintiff's claim was interposed by her, or in her behalf.

Let us then see whether there is anything in the Regulation of 1805 that opens to the plaintiff the doors of the Zillah Court, which the Regulation of 1793 had closed.

By Regulation II of 1805, Section 3, it is declared that the limitation of twelve years, fixed by the Regulation of 1793, shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property of the person or persons in possession of such property, when the claim of right thereto may be preferred in a competent Court of judicature, shall have acquired possession thereof by violence, fraud, or any other unjust, dishonest means whatever; or if such property shall have been so acquired by any other person or persons from whom the actual occupant or occupants may have derived his or their title, and shall not have been subsequently held under a just and honest title (such as inheritance, purchase, fair donation, or any other fair title, believed to have conveyed a right of possession and property) during a period of twelve years antecedent to the time of preferring a claim of right thereto in a competent Court, provided that such violent, fraudulent, unjust, or dishonest acquisition be established to the satisfaction of the Court in which the claim may be preferred, or if the suit be appealable, to the satisfaction of the proper Court of Appeal.

And by the third Clause of the same Section, after prohibiting the Courts from taking judicial cognizance of any suit preferred after sixty years' non-prosecution, the Regulation proceeds to declare that, although the property claimed may have been acquired by an insufficient title within the period of sixty years, if the property so acquired shall have descended by inheritance to the person in possession when the claim is preferred, or if such person shall have obtained just and honest possession thereof by purchase, fair donation, or by any other title believed to be just and valid, and not appearing to be in any respect collusive for the purpose of depriving the plaintiff of his right, and either such occupant

himself or any other person in his behalf, or from whom the property may have been obtained under any of the titles aforesaid, or the whole in succession, shall have held quiet and unmolested possession under a title believed to be just and valid, during a period of twelve years antecedent to the claim thereto being preferred in a competent Court, the provisions made in the first and second Clauses of that Section shall not be considered applicable to any private claims of property so circumstanced, which are therefore to be deemed inadmissible, as heretofore, after twelve years from the origin of the cause of action, unless the same be cognizable under the exceptions and provisions already in force.

Under this regulation, the plaintiff contends that, although her claim was not preferred to any competent Court till more than twelve years after her cause of action had arisen, yet that, as her nephews had acquired possession of the property by unjust and dishonest means, and as the purchase by the appellant, however fair and just, had been made within twelve years, neither they nor any person under whom they claimed, had, during a period of twelve years antecedent to the time of her preferring her claim, held under any fair title, believed to have conveyed a right of possession and property. The prohibition contained in Regulation III. 1793, Section 14, was not applicable to her case.

In considering the provisions above referred to, it must be kept in mind that one main object of these Laws of Limitation is to protect an honest purchaser from the consequences of an owner's neglect to assert his rights, and thus giving to an usurper the semblance of a title which he did not really possess, and that, by the express words of the Regulation, the proof of the fraudulent, unjust, or dishonest acquisition is thrown upon the plaintiff. It is necessary, therefore, to ascertain what is meant by an unjust or dishonest acquisition. It is obvious, from the third Clause of the Section, that it is not intended to include every acquisition without a just title, for by that Clause acquisitions are protected that have been obtained by any title believed to be just and valid, though in reality insufficient. It must be necessary, therefore, for a plaintiff, in the first place, to show that the person under whom an occupant, by just title acquired within the twelve years, derives his title, had acquired his possession by a title which he did not at the time believe to be just and valid.

The plaintiff in this case contends that, as her nephews must have known that one-half of the inheritance belonged to her, and as they must have known that she was still alive, their assumption of the entire property was a dishonest acquisition, and could not have been claimed by them under any title which they believed at the time to be just and valid.

It cannot be denied that there are many circumstances leading to a strong suspicion that this was the case, and the Sudder Adawlut appears so to have considered it. But strong as the grounds of suspicion undoubtedly are, their Lordships do not consider the facts proved as sufficiently establishing to their satisfaction that the nephews knew that they had no right to the whole estate. They may have originally taken possession under the belief that their father, Hafiz, had acquired a title to the property, of which he had been in possession up to his death. They may have been ignorant of the existence of their aunt or of her title to any share of the property; there is no evidence of their being aware of either; that they were so could only be matter of conjecture; but fraud and dishonesty are not to be assumed upon conjecture, however probable. But, to avoid the effect of the lapse of time, the plaintiff must establish the existence of conscious injustice in the acquisition by proof. Their Lordships think this has not been done, and therefore they will advise Her Majesty to reverse the decree of the Sudder Dewanny Adawlut, and to affirm the decree of the Provincial Court, with costs of both the Courts below, but without costs of this appeal to Her Majesty.

The 8th August 1842.

Present :

Lord President Wharncliffe, Lord Brougham, Vice-Chancellor Knight Bruce,
Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

Sale for arrears of Revenue.

On Appeal from the Sudder Commissioners of Bengal.

Baboo Deep Narain Sing,

versus

Lal Chutterput Sing.

Suit brought in 1821 to annul the sale of a zemindary in Allahabad which took place in 1802 for arrears of Revenue. The Privy Council concurred in the conclusion come to by the Mofussil and Sudder Commissions constituted by Regulation I. 1821, that the sale ought, notwithstanding the great lapse of time, to be set aside; but considering the *bona fide* character of the sale, awarded compensation to the purchaser.

Vice-Chancellor Knight Bruce.—THIS case has been properly argued on the merits. The doubt suggested by one of the learned Counsel for the appellant, whether the district to which the zemindary or pergunnah in question belongs, is within the operation and powers of the Commissioners whose judgments are before us, has not been insisted upon, and seems to us excluded from our consideration by the whole state of the cause.

We think also that the argument has rightly laid no stress on the circumstance of the son of Lal Juggut Raj, and not Lal Juggut Raj himself, though alive, having been the complaining party in the proceedings below. Having regard to the nature of the jurisdiction and question, the petition of Lal Juggut Raj, printed in page 21 of the Appendix, and the course taken by all parties, we could not have given effect to the objection, if pressed.

The length of time also that elapsed between the sale, of which complaint is made, and the commencement of these proceedings, though very properly urged as matter of grave consideration with reference to the judicial discretion to be exercised, and the mode of exercising it, has, with equal propriety, been admitted, on the part of the appellant, not to form an objection to the jurisdiction, or a bar to relief in a case such as the present.

The rejoinder, indeed, of Deep Narain Sing, before the Mofussil Commission, is thus expressed upon the subject of time in the same Appendix, page 18 :—"That, as the special pleas urged by this defendant, in his reply filed in the Court of Appeal for the Division of Benares, to show that plaintiff's action was not cognizable by that Court, owing to the expiration of the period of limitation, &c., are considered incapable to the Special Commission with reference to the provisions of Regulation I. 1821, the defendant will not, therefore, dwell upon them any longer in this place."

The first point in question is, or rather was, whether this case could correctly be considered as coming within either of the predicaments enumerated in the second Clause of the third section of the Regulation of January 1821, under which the proceedings arise. For, if not, the Commissioners might well have been contented to be without authority in the matter.

It was, however, conceded, on the appellant's part, in an early stage of the discussion, that, whether the Rajah of Benares or Deep Narain Sing was the real purchaser, the case fell within one of those predicaments; that, namely, of the purchaser having been an officer on the Collector's establishment, or employed in the collection of the public revenue within the district, or in the private service of the Collector, or the surety of such officer, or a relation, dependant, or connexion of such officer or surety—a conclusion inevitable from the documents set forth in pages 31, 32, and 33 of the Appendix.

It may be true that the written pleadings below do not suggest this pointedly, or do not suggest it at all. The terms, however, of the Regulation, and of the Resolution or Order of the Governor-General in Council, dated 27th February 1821, the nature of the jurisdiction, and the simplicity of the fact, render the comission for the present purpose not material. Nor are we to be understood as meaning to express, or intimate an opinion, that there is not any other (we think, on the contrary, that there is at least one other) of the described predicaments within which the case is plainly brought. This, however, only establishes that the Commissions had legal authority to set aside the sale,—not that the power ought, in the particular case, to have been exercised. The question, then, arises whether, as the Commissions were not of necessity bound to exercise it, though legally vested in them, the respondent's pleadings before them stated, and the documents and facts in evidence proved, a case upon which it was a right and sound exercise of discretion to set aside the sale.

The pleadings are, in our opinion, sufficient for the purpose, even independently of the enlargement from form and technical rules which is conceded to proceedings under the Commissions, perhaps by the Regulation of January 1821, but certainly by the Resolution or Order of the 27th of February in that year.

The documents and facts properly in evidence, whether we reject the doubtful and suspicious part, or consider it in connexion with what is authentic and worthy of reliance, appear to us, upon an authentic consideration of them, assisted materially by the able discussion to which they have been subjected from the bar, to warrant the conclusion to which both Commissions have come, that the sale of the zemindary or pergunnah in question ought, notwithstanding the great lapse of time, to be set aside.

But in agreeing thus far as we do with each of the tribunals below, we desire not to be understood as adopting or acceding to all the conclusions of fact, or as following or assenting to the whole of the reasoning upon which either Commission appears to have proceeded. And especially we think it right to say that a perusal of the letter or despatch from Lord Wellesley of the 8th of March 1802, satisfies our minds that the clause or passage on which reliance has been placed, as if it contained a positive prohibition of such a sale as that in question at the time when it took place, does not bear that interpretation; that it was one of advice and recommendation, and not part of the orders or directions which the document contained.

Though differing, however, from the mandatory construction which has been put on this passage, and which the context does not allow, we are far from saying that it is a circumstance in the case not deserving attention; on the contrary, it tends to shew that the Supreme Government recognized the general correctness and propriety of the views suggested by the Lieutenant-Governor in his despatch of the 7th of January preceding.

The printed extracts from the two documents are thus at pages 40 and 41; the extract from Lord Cowley's despatch is as follows:—“ In realizing arrears of revenue “ in the Company's provinces where other means fail, recourse is had to a sale of the “ land, and within the last eleven years this Regulation has occasioned the sale of a “ large proportion of the land and the dispossession of a great number of the old “ zemindars. Some of these may have become inferior cultivators, and some may “ have sought other means of livelihood, but under a Government so long and so “ well established few have ventured, or, if they have ventured, few have been able, “ to maintain themselves in a state of insurrection. But from the temper, disposition, and character of the inhabitants of the ceded countries, particularly of the “ province of Rohilcund, I have no doubt that they would rather submit to the “ varied modes of oppression to which they have been accustomed under the “ Nabob's Government, while their zemindary titles should be continued to them, “ than endure to be dispossessed of their lands in the most regular and legal mode

"under new regulations. The former grievances they would think supportable under the hope, however slender, of future redress, but the latter would drive them to despair; and from the neighbouring countries, to which they might easily resort, they would continually infest their alienated lands. Though not prepared to give any specific detail on this subject, I am satisfied that were coercion is necessary to realize the dues of Government from defaulters, some mode less offensive should be devised, and a sale of the land only resorted to in the last extremity."

The printed extract from the answer of the Governor-General to that despatch is this :—"No sales of land for the recovery of rent due to Government should be authorized within the ceded provinces until a more effectual settlement of the country shall have taken place."

The sale under consideration, which took place in the very year in which these important papers were written, and in the countries to which they relate, was one of that very kind which Lord Cowley was satisfied should be only resorted to in the last extremity, as being a measure less tolerable in the estimation of the inhabitants of these provinces, so recently added to the British empire, than the different oppressions which they had borne under their native rulers, and as calculated to drive them to despair, but which Lord Wellesley considered should not take place at all before a more effectual settlement of the country—a settlement that, according to our view of His Excellency's meaning, had not taken place at the time when the sale was made.

It may be said that it was made with the sanction of the local Government, of which Lord Cowley was a prominent member, or the chief under the supreme Government. The sale, however, was not at Bareilly, but at Allahabad. The authority for it, if, upon the whole view of the circumstances, authority there was which proceeded from Bareilly, was consequent upon the representations of the case made to the provincial Government, then by Mr. Ahmuty, the Collector at Allahabad—representations which, as they appear to us, placed the defaults and conduct of Lal Juggut Raj in a light stronger and more unfavorable to him than the facts, so far as we are enabled to judge of them, really warranted. The Government at Bareilly may have been led to think that the case was one of the last extremity. We do not see grounds for holding that it was of that character.

Considering the circumstances under which Roy Madary Lal had obtained the increased jumma from Lal Juggut Raj; the large amount of that increase; the position in which himself and his property had been placed when the subsequent documents obtained from him were obtained; the questionable and doubtful state of his accounts before and at the time of the sale, as appears from Mr. Ahmuty's Report of 4th of November 1802 (page 44 of the Appendix), and from other sources, the high degree of probability, if not certainty, that, had Lal Juggut Raj been allowed all that ought to have been allowed to him, the balance claimed from him would at least have been greatly reduced; considering the harsh measures used towards him, the pressure under which he was placed during the earliest period of a Government and an administration of public affairs which were altogether strange and new to the country, not forgetting also the kind of notices by which the sale was preceded, and the circumstances generally by which it was accompanied and immediately followed, we cannot, consistently with the declared object and intention of the Regulation of January 1821, avoid saying that the sale, if not protected by length of time, ought not to stand; and that, having regard, on grounds of private justice, to the state of embarrassment, difficulty, and distress to which Lal Juggut Raj was reduced, as well as to the powerful adversaries opposed to him, and on grounds of general policy, to the motives and spirit of the Regulation of 1821, it would be inequitable and publicly inexpedient to permit such a title to be protected by the lapse of time that has taken place.

The effect that it ought to have as to the terms and conditions which should accompany the appellant's deprivation of the property is open to very different considerations.

Without entering into a more minute detail than is necessary or may be expedient, we consider it right to add that, among the evidence which has most strongly influenced our minds with regard to the character of the sale, the conduct of those concerned in it, and the manner in which it should be treated, are the following documents to which it may be as well to refer in a chronological order, commencing at a time less, we believe, than two months after the cession by the Nawab Vizir.

1st. The perwanna to Juggut Raj of the 4th of January 1802, page 240; the ikramamah of Baboo Nek Sing, dated the next day, in the same page; the letter and advertisement for Juggut Raj's apprehension, both also dated the 5th January 1802, page 241, coupled with the Collector's despatch to Bareilly, also of the 5th January 1802, page 41, stating thus as to Juggut Raj's property—"I have deputed a saazawal (Baboo Nek Sing) to make the collections from the zemindars, and as Juggut Raj's profits were considerable, these pergunnas will still yield sufficient assets to ensure the revenue of the current year, to its full extent;" stating also this: "I have issued the necessary orders for the attachment of Juggut Raj's property, and have directed the several officers to be vigilant in apprehending his person, should he attempt to enter the Company's jurisdiction."

His despatch also to Capt. Worsley, of the same date, at page 42, is in these words: "Sir, I am just informed by one of my sowars, that Juggut Raj was safely lodged in the fort of Loundeh, with a party of three hundred followers. On the supposition that this account is correct, I think it will be advisable, in the first instance, to summon Juggut Raj to deliver up the fort, offering him the protection of Government in the event of his settling his wasilat for the current year. Should Juggut Raj make any resistance, you will be pleased to adopt the necessary measures for securing the fort, if you conceive, from local investigation, that such an event is practicable with the small force at present under your command, otherwise I could wish you to prevent his escape, if possible, till further assistance can be afforded. In the meantime, you will report to me, should Juggut Raj decline to deliver up the place, the strength of the fort, the force that is likely to be opposed to you, as well as the additional troops you will require for obtaining possession and securing the person of Juggut Raj. If the immediate aid of the detachment of police is required, you are authorized to withdraw that company for the present service."

I will next notice the Collector's letter of the 9th of January 1802, four days after, at page 22; then the several perwannas to Baboo Nek Sing and to Juggut Raj and his dewan, of various dates in January and February 1802, pages 241, 242, 243, and 244; the Collector's letter to Mr. Mercer of the 9th of February, and the kownamah of Baboo Nek Sing, of 21st of February 1802, at pages 22, 24, and 25; then the bond and petition of Lal Juggut Raj, of the same 21st of February 1802, at pages 24, 244, and 245; the perwannas to Baboo Nek Sing, Baboo Ram Kishen, and Juggut Raj, of the 23rd and 24th of February 1802, at pages 246, 247, and 25; the several perwannas and petitions of various dates between the 24th of February and the 16th of April, both inclusive, of which some are set forth and the others mentioned in pages 248, 249, 250, 251, and 252; the Collector's narrative or order, pages 253, 254, and 255, containing a statement on the subject of Lal Juggut Raj's affairs and transactions from the 20th of December 1801, to the 10th of April 1802; the perwanna to Ramkishan Sing, of the 17th of April 1802, mentioned at the top of page 256; the notice perwannas and advertisements of various dates in May and June 1802, at pages 259, 260, and 261; the petition of Lal Juggut Raj, with the Collector's answers or orders upon it, dated

the 17th of June and 2nd of July 1802, at pages 30 and 49; the estimate, memorandum, or sketch of account on which the bond dated the 29th of June 1802 was founded, the bond itself, and the surety or bale bond of the 2nd of July following, at pages 28, 29, 261 and 262, these three documents being all substantially contemporaneous with the petition and the answers or orders upon it just mentioned.

Next the letter of introduction, and recommendation of Chittoo Sing from the Rajah of Benares, of the 25th of July at page 30. The documents of 14th of August and 5th of September already mentioned with respect to the suretyship.

Then the letter to the Board at Bareilly from Mr. Ahmuty, dated 1st September more than three weeks before the period appointed by the bond dated the 29th of June, for the payment of the instalment of 32,206 rupees, 15 annas, 3 pice, but silent as to that transaction; between which letter and the date of the answer to it (the answer being dated 11th September) occurs the advertisement of 8th September, for the sale of the zemindary on 30th October; these documents are in pages 32, 33, and 270.

The answer of 11th September, the time of the receipt of which does not appear, is thus at page 33,—it is to Mr. Ahmuty from the Board of Commissioners: “Sir,—I have the honor to acknowledge the receipt of your letter of the 1st instant, and am directed by the Honorable the Lieutenant-Governor and Board of Commissioners to inform you that, as it appears from your letter that Juggut Raj still continues to persist in declining to pay the balance due from him, they authorize you to issue a proclamation, setting forth that, unless Juggut Raj shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold at a period to be fixed by you, which the Board are of opinion should be rather later than the 30th of September, in order to afford sufficient time to Juggut Raj to avail himself of the opportunity now afforded to him for a satisfactory and amicable adjustment of his account.”

We would then notice the advertisement of 18th September, fixing 10th of October as the day of sale, and the contemporaneous perwanna to Juggut Raj of the 25th of September, the last instalment day not having arrived. Those are at pages 270 and 271.

Then the advertisement of the 5th of October is in these words: “On the 18th of September 1802 A. D., an advertisement was published, stating that, on the 10th of October proximo, pergunna Barah, the zemindary of Lal Juggut Raj, would be sold by public auction for the recovery of a Government arrear. It is now ordered that the said advertisement be cancelled, and, in lieu of it, another advertisement be issued, in conformity with the orders of the Chief Board, under date the 11th of September ultimo, to this effect:—that whereas the said Juggut Raj withholds the payment of a large amount of Revenue justly due to Government, and contumaciously and fraudulently evades its discharge, should the aforementioned, therefore, personally attend, and pay up the arrear justly due by him into the public treasury by the 30th of October instant, good; else the pergunna of Barah, the zemindary of the aforementioned person, will be sold by public auction on the aforesaid date, in liquidation of the Government balance, and the auction-purchaser of the said pergunna will be entitled,” and so on.

This advertisement may, or may not, be the same with that which is found in page 273, nor is it very material to insist upon any difference between the two.

Then comes the Collector's letter to Bareilly of the 6th of October, at page 44, which is this:—“I have to acknowledge the receipt of your letter of the 11th ultimo, and have to request that you will be pleased to report to the Honorable the Lieutenant-Governor and Board of Commissioners that, in conformity to their order, I issued, on the 1st instant, a proclamation, setting forth that, unless Juggut Raj shall appear and agree to a fair and equitable adjustment of his accounts, his estate will be publicly sold on the 30th of the present month,” and

so on. "I have, further, had conveyed to Juggut Raj, who resides at present in "Bundlecund, a copy of the proclamation, together with a perwanna from myself "encouraging him to return to his estate."

Lastly comes the record of the proceedings of 30th of October, the day when the business was completed, the day of sale, closely followed by Mr. Ahmuty's despatches to the Board of Bareilly of 4th of November and 30th of November 1802, between which, and probably after which, that Board communicated with him, though to what effect is not disclosed, and seems not to be known. These despatches exhibit not only uncertainty as to the amount of the debt due or to be considered as claimable, but a want of accuracy on the part of the Collector. These are in pages 35, 36, 44, 45, 46, 274, 275, 276, and 277.

We are not unaware of the propriety and expediency, in general, of giving great weight to acquiescence or delay on one side, and to long possession on the other, or of the generally questionable policy of discrediting or lessening the public faith in transactions having the sanction of the Government or its officers. These and similar considerations were, however, in the cognizance of the framers of the Regulation of 1821, and by them it was decided to be, on the whole, just and expedient that, in the peculiar position in which the inhabitants of this part of India were placed at the commencement of the British rule, there should not be applied to the investigation of the peculiar transactions, and the redress of the peculiar hardships which then took place, merely ordinary principles.

The Regulation of 1821 was preceded by Mr. Stuart's Minute of 1820, containing these passages: "I solicit the attention of the Board to a matter of "considerable importance. During the first six or seven years which followed the "acquisition of the provinces ceded to us by the Newab Vizir, the mal-administra- "tion of Allahabad, and some of the neighbouring districts, combined with the "intrigues and influence of certain opulent and powerful natives, and the poverty "and ignorance of the zemindars and talookdars, led to the abusive alienation, to a "great extent, of landed estates within those districts, and to the consequent ruin "and extreme misery of the proprietors. For a full detail of those transactions "I refer to the report from the Board of Commissioners," and so on.

He then refers to certain documents which are mentioned, and he proceeds to say—"From those documents, of which, for convenience of reference, extracts are "annexed to this paper, the Board will observe that a Special Commission was "strongly recommended by the Board and Mr. Fortescue for the purpose of investi- "gating the alleged abuses, and affording redress to the injured parties. The "consideration of the measure was postponed for the time, and has not been since "resumed, owing probably to the suspension of the introduction of a Permanent "Settlement into the Ceded Provinces. Now that the measure of Settlement in "the Ceded and Conquered Provinces, upon fixed and permanent principles, is "again under consideration, I venture strongly to recommend to the Board the "institution of a Special Commission, as formerly suggested, for the purpose of "investigating the abusive alienations in question. I beg accordingly to submit "to the Board the accompanying paper, comprising an outline of the plan upon "which the Commission should be instituted. The investigation of these cases, "with any hopes of success, will require a thorough research into voluminous and "complicated Revenue accounts. It will require local enquiries, and free and con- "stant communication with the parties themselves and with the local officers. "The delays and forms of the Courts of Justice oppose great obstacles to their "conducting investigations upon those principles, and the parties injured are equally "incapable of supporting the expense of protracted litigation, and of defending "themselves in that course of proceeding against the arts and intrigues of their "opulent and powerful adversaries. These reasons I have no hesitation in urging "as fully justifying a special deviation from the ordinary system of our judicial "administration. The delay which has occurred is unquestionably to be regretted,

"but I cannot think that it is a sufficient ground for excluding the injured parties from redress. It is a noble principle of the English law that no time shall avail in favor of fraud, and I believe that there never were transactions to which the maxim was more justly applicable. It would, indeed, be an afflicting reflection that men who have acquired estates by the basest means should enjoy all the advantages of a Permanent Settlement, whilst their victims should have their misery heightened by being the hopeless witnesses of the increasing value of the property of which they have been so iniquitously despoiled."

The preamble of the Regulation of 1821, so far as it is material now to quote it, was thus expressed at pages 3 and 4 of the Supplemental Appendix :—"It has appeared that, in the first seven or eight years after the acquisition of the Ceded Provinces by the British Government, the native officers of Government, their relations, connections, and dependants, taking advantage of the novelty of the British rule, of the weakness and ignorance of the people, and (in some cases) of the culpable supineness and misconduct of the European functionaries under whose authority they were employed, contrived, by fraudulent and iniquitous practices, to acquire very extensive estates in several of the Provinces in question, more especially in the districts of Allahabad, Cawnpore, and Goruckpoor, thus wrongfully depriving of their just rights a great number of the ancient land-owners, and reducing them and their numerous dependants to ruin and misery. These abuses have been chiefly practised through the perversion, to the purposes of chicanery and fraud, of the rules enacted for the collection of the Government revenue, more especially the provisions relating to the public sale of land for arrears. Under cover of these rules, but contrary to the true intent and meaning of the law by which (though a considerable discretion was left to the Revenue authorities) the measure of a public sale was principally designed for cases of embezzlement, contumacy, or fraud ; many estates were sold from which no balance (or a very trifling balance) was due, or on which the arrear accrued without any embezzlement or wilful default on the part of the Sudder Malgoosar, and others were disposed of without an observance of the prescribed forms ;" and then other circumstances are alluded to.

In a subsequent part of the preamble it is said : "The persons who have suffered by the aforesaid abuses are, for the most part, poor and ignorant men, unaccustomed, under the former Government, to any regular system of law, little acquainted with the principles of the British Code, or the regular forms of British judicial proceedings, incapable of availing themselves of the protection it was designed to afford, and possessing not the means of securing the aid of individuals better informed, while those opposed to them are, for the most part, men of wealth and power."

He then goes on to make other important observations with reference to that subject, and proceeds thus :—"The proceedings of the established Courts must necessarily partake of any defects belonging to the law which it is their duty to administer, and it would be obviously inconsistent with every sound principle to grant a general discretion to those Courts to deviate from the law on individual views of expediency or justice," and then, after some further remarks, it is thus expressed :—"In consideration of the above circumstances, it has appeared to the Governor-General in Council to be essentially necessary to the ends of justice that a Special Commission, with large discretionary powers and with full authority to regulate its proceedings according to the exigencies of the cases brought before it, should be constituted for the purpose of investigating the cases above described, of restoring to their just rights the zemindars and other proprietors who have been wrongfully dispossessed," and so on, and the rules are there laid down.

The subsequent Resolution or Order of February 1821 had these passages : No. 13—"In cases, however, in which the Commission may adjudge compensation not exceeding Rs. 1,000, or in which they may adjudge the repayment, by Government,

"of the purchase-money of any mehal of which the sale may be annulled, or in which they may direct the price of the stamped paper used for a plaint or petition of appeal, in lieu of the institution-fee, to be returned to the party by whom the amount may have been disbursed, an order, signed by the Commissioners and specifying the nature of the charge, shall be sufficient authority for the Collector of the District immediately to pay the amount."

No. 22. "With regard to the rules of practice and forms of proceedings to be followed by the Commissioners, His Lordship in Council presumes that it will not be necessary materially to deviate from the course followed by the Civil Courts, with this important exception, that it shall be specially their duty to institute an active enquiry into all the circumstances of the cases brought before them, and to take their own course for the investigation of the truth, without confining themselves to the points stated by the parties, or by any technical forms of pleading or management."

Nos. 25 and 26 are of the same character.

No. 32 is this—"It is not, however, the personal character of the officers entrusted with the administration of Civil justice that has chiefly led to the institution of this official tribunal. In determining on the measure, His Lordship in Council has been still more influenced by the persuasion that the system under which those officers have to act, and the laws which they were bound to administer, are seriously defective in their application to the Ceded and Conquered Provinces, while the principles of Revenue management were very imperfectly settled; the Revenue authorities have been compelled to decide on the most important points relative to private rights amidst the uproar of a general settlement, and under the urgency of securing the revenues of inordinately extensive districts. That they should have frequently erred, can excite no surprise; that their errors were extensively injurious, it would be preposterous to doubt. In many instances those errors admitted of no legal remedy by the Courts, because they were committed in the exercise of a discretion which the Courts could not legally control; and that the ordinary tribunals should, among a people new to our rule and accustomed to the arbitrary domination of native amils, have failed to protect the agricultural community from the consequences of the acts of the officers of Government, even where those tribunals were competent to interpose, is assuredly no impeachment of the individual functionaries by whom they were filed, nor any conclusive proof that they are not generally well adapted to secure the impartial distribution of justice between individuals, and in territories long settled under our Government."

Some time afterwards, the Regulation of 1823, printed at page 8 of the same Appendix, provided that—"First, such part of Clause 1 Section 3 Regulation I, of 1821 as restricts, or can be construed to restrict, the cognizance of the Commissioners acting under the provisions of that Regulation in the matter of suits to recover possession of lands lost through public sales to cases wherein such sales have been effected by the undue influence of a public officer, is hereby rescinded. Second, in the several cases specified in Causes 2, 4, 5, and 6, Section 3 Regulation I of 1821, as well as in all cases wherein it may appear that any plaintiff has been deprived of his rights by an illegal sale made within the period specified in the 1st Clause of the said Section, it shall and may be lawful for the Commissioners acting under the provisions of that Regulation to take cognizance of any suit preferred to them, and to pass judgment on the same, although there may be no proof that undue influence was exercised by any public officer to the injury of the plaintiff. Third, provided also that, in the cases specified in Clause 3 of the aforesaid Section, if there shall be proof or strong presumption that the purchase or acquisition of the property sued for was effected by violence, extortion, oppression, or fraud, it shall not be necessary for the plaintiff to plead or establish that undue influence was exercised." It is in the spirit mainly of these portions of the important documents to which reference has just been made, that we have deemed it right to construe the letter of

the Regulation of January 1821 ; upon that construction, we consider that the Mofussil Commission rightly held it to be within their competency to set aside the sale upon the terms of a payment to be made by the party succeeding in the contest, to the party dispossessed by the decision, and rightly also held that the present was a case which the terms of the 2nd Clause of Section 4 of the Regulation of 1821 might not improperly be held to include.

That Clause is thus, in page 6—“ In cases in which the Commission may deprive any person of rights legally vested in him, under the existing Code, or may make award upon doubtful claims, or in which the title of any person, though invalid, may have been acquired by him *bonâ fide* under an express or implied assurance of its validity on the part of the Board, the Collector, or Judge of the District, it shall be competent to the Commission to adjudge compensation in money from the Treasury of Government ; provided, however, that, in cases in which the compensation assigned to any individual shall exceed the sum of Rs. 1,000, the sanction of Government shall be necessary to authorize the disbursement.”

A prior Clause, the 8th of Section 3, had provided thus :—“ The operation of the foregoing Clauses shall not be confined to cases in which lands or rights connected with land sold, transferred, alienated, or usurped as above, may be held by the person originally benefiting by the sale, transfer, alienation, or usurpation, but shall equally extend to those in which the said lands or rights may be held under a title derived from such person ; provided, of course, that in cases in which it may appear that the person so holding under a derivative title was in no degree concerned in, or cognizant of, the original wrong, the claims of such person to compensation for any loss he may sustain under the operation of the present Regulation shall be held entitled to a very liberal consideration.”

We do not, on the whole, think it an undue extension of the 2nd Clause of Section 4 to say that this case may be held to come within one of the predicaments which it describes ; nor can we agree with the Sudder Commission in their conclusion that justice or policy did not in this case require the power of directing a payment by the successful party to the party deprived of possession, or the power conferred by the second Clause of Section 4 to be exercised. It being our opinion, having regard to the benefit which, to a certain extent, Lal Juggut Raj derived from the purchase-money ; to the course of conduct, not certainly altogether justifiable, which previously to the sale he had pursued ; to the great length of time that was suffered to elapse before the sale was judicially questioned ; to the part which those entrusted with the functions of the local Government took in the sale, and to the nature and extent of the allegations and evidence by which it has been endeavoured to impeach the conduct of the late Rajah of Benares in respect of it, that both justice and policy required each of these powers to be called into action.

We think also, upon a review of all the circumstances of the case, especially those to which reference has just been made, that it was, on the whole, proper to leave the appellant and the late Rajah of Benares free from any account or charge in respect of the income and profits of the purchased property, from its acquisition in 1802 to the date of the Mofussil decree, proved, as we think it is, by the conduct of the parties and otherwise, that the clear profits and net income derived from this source by the Rajah and Deep Narain Sing, or one of them, must have much exceeded the amount of the interest for the same time calculated at the rate of 12 per cent. per annum upon the Rs. 93,000 (the purchase-money) ; we consider it right, under all the circumstances (and, among them, attending to the fact of the pension which the Indian Government for some years paid to the respondent or his family), that any claim on the part of the appellant or the late Rajah of Benares in respect of interest on that sum should be treated as satisfied, but not as more than satisfied, by the income and profits ; and we shall not advise Her Majesty to direct any account in this respect.

With regard to the true state of the accounts between Lal Juggut Raj and the Government, if taken on just and equitable principles, up to the time of the sale, as well as with regard to the mode in which the sum of rupees 93,000 was applied, it is probably at this time very difficult, if not impossible, to arrive at any exact conclusion. The Mofussil Commission, which appears to have examined and considered the details of the facts of the case with most commendable care and attention, held that, of the rupees 93,000, the sum of rupees 26,458-6-6 ought to be considered as the total amount of benefit received by Lal Juggut Raj; nor do we see that the Sudder Commission viewed this particular point differently.

In such a state of things, satisfied as we are that this conclusion, in point of amount, whether precisely and exactly or not precisely and exactly accurate, is not far remote from the truth, and, unable with confidence to pronounce that it is to any extent inaccurate, we do not feel ourselves warranted in dissenting from this part of the decision of the Mofussil Commission.

Our view, however, of the facts, and of the spirit or intention of the 2nd Clause of Section 4, leads us, as has been stated, to the conclusion that not only the residue of the rupees 93,000, but a further sum, by way of compensation, ought in this case to be paid by the East India Company to Deep Narain Sing. We had hoped that its amount, and this portion of the cause generally, might have been arranged by the East India Company and the parties for themselves. As it appears, however, that this cannot be done, we have been obliged ourselves to undertake the duty of fixing the amount of compensation.

Under the various and conflicting considerations to which the case is liable, and with such knowledge as we possess on the subject, we have felt much difficulty in performing this task. But, judging as well as we can, after due allowance made in respect of the pension already alluded to, we deem rupees 27,000 a proper sum. We conceive, therefore, rupees 120,000, with interest at the rate of 5 per cent per annum (which we think the proper rate) from the date of the Mofussil decree (from which date we consider the respondent as entitled to the enjoyment of the property in dispute as between him and the appellant) should, in respect to the sale being set aside, be paid by the East India Company to Deep Narain Sing, and that the East India Company should, in their accounts with Lal Chutterput Sing and Lal Juggut Raj, charge them, or one of them, with the principal and interest of the above-mentioned amount of Rs. 26,458-6-6,—a mode of arranging the matter which we consider due alike to them and to Deep Narain Sing, having regard to the proceedings that have taken place in India since the Mofussil decree, particularly those stated in pages 423, 424, 425, 426, 439, and 440.

We may add that, so far as the East India Company is concerned in this matter, it is far from irrelevant to notice the view taken of it officially by such public functionaries employed in the administration of their affairs, as Mr. Colebrooke and Mr. Deane, who, in the year 1808,—a period not far removed from the time of the sale, but when of course the special law introduced by the Regulation of 1821 did not exist,—reported on the subject to the Government in Council thus: “We have the honor to submit, for your Lordship’s consideration, “a petition which has been presented to us by the former proprietor of pergunnah “Barah, in the district of Allahabad, complaining of the sale made of his zemindary “in the year 1802, together with translation of two documents produced by him, “and copies of correspondence which led to the sale. Your Lordship will observe, “from the correspondence, that Raja Juggut Raj had engaged, during the Vizier’s “Government for the pergunnah of Arael, in addition to his own zemindary of “Barah,” and so on.

Mr. Colebrooke and Mr. Deane then gave a short summary of the facts, ending thus:—“That, on the 2nd of July, Mr. Ahmuty admitted the validity of “Juggut Raj’s claim to certain items of credit as deductions from the balance “adjusted on the 17th June, which items Juggut Raj states, in his account, to

"have exceeded the balance charged to him, and which, if adjusted in time, might, "previous to the Collector's letter of the 1st September, have considerably reduced, "perhaps entirely extinguished, the arrear. Mr. Ahmuty's letter of the 4th "November, and the account produced by Juggut Raj, both agree in making the "gross balance, adjusted on the 7th June, Rs. 72,207, and the net balance on the "sudder jumma Rs. 44,352; the difference, Rs. 27,875, Mr. Ahmuty calls a "deficiency on the assets of the pergunnah, while the documents produced by "Juggut Raj shew it to have been those disputed items for which Mr. Ahmuty "promised Juggut Raj a remission in the event of Government authorizing it, "or his assistance for the recovery thereof from the parties actually owing the "money, if the remission should not be authorized. It does not appear, however, "that any report on the subject was ever made to the Lieutenant-Governor, or any "measures adopted for the realization of the amount from those on whom (and "not on Juggut Raj) the loss should have fallen, or any steps taken for the "adjustment of those items for which Mr. Ahmuty had promised to give credit. "The sale of Juggut Raj's estate seems, on the contrary, to have been resorted to "by Mr. Ahmuty as the readiest mode of settling an intricate account and of "discharging every pledge on his part."

Then follow two paragraphs which it is unnecessary now to read, and the concluding paragraph is this:—"It is too late to regret that the first measure of "the British Government on the introduction of its authority into the province of "Allahabad, should have been the sale of one of the largest zemindaries in it, and "the extirpation of an old and respectable family; and, at this distance of "time, the interposition of Government may, probably, be no longer of any "avail. After a lapse of six years, it must be scarcely possible to revise the "collections of the successive Sezawals deputed by the Collector, or to revert "to the different persons on whom the Collector had engaged to enforce "Juggut Raj's claims; and from the retirement of the public officer through "whose concealment of some, and misrepresentation of other, material facts, the "sale was ordered, all redress seems to be precluded; at the same time, therefore, "we submit the case to Government as one of peculiar hardship, we confess our- "selves at a loss to frame any specific proposition in regard to it. Should, how- "ever, every other redress be impracticable, your Lordship may possibly consider "Juggut Raj, under all the circumstances, entitled to some provision from "Government."

Nor does it end there, since the subsequent papers on the subject, including the grant of the pension of Rs. 5,000 per annum to Lal Juggut Raj, in the following year, 1809, to which reference has already been made, shew that the Supreme Government of India entertained substantially the same view of the case as that taken in the despatch of Mr. Colebrooke and Mr. Deane.

We shall humbly recommend to Her Majesty to affirm the Sudder decree, except as to compensation and restitution money, and costs; and to order that the East India Company shall pay to the appellant, Deep Narain Sing, the sum of Rs. 120,000, with interest at 5 per cent per annum, from the date of the decree of the Mofussil Commission, this sum to be considered as in full for compensation and restitution money in respect of setting aside the sale; and to declare that, by its payment, all claim for interest on one hand, and for rents and profits on the other, between the appellant and the late Rajah of Benares and the respondent, is to be considered as extinguished, and that the debt, if any, between the Government and Lal Juggut Raj at the time of the sale, and all claim against the Government in respect of having made the sale, are to be deemed, in like manner, to be extinguished. But that the sum of Rs. 26,458-6-6, part of the sum of rupees 120,000, is, with the interest from the date of the decree of the Mofussil Commission at the rate of 5 per cent. per annum on the Rs. 26,458-6-6, to be made good to

the East India Company by charging, and they are accordingly to be at liberty to charge, the respondent in account therewith, and they are to be at liberty to deduct the same from what may be coming from them in respect to the zemindary, its profits, or revenues.

Lord Brougham.—In what way is the question raised before the Sudder of the compensation of the Rs. 93,000? The Sudder reversed the Mofussil decree as far as regarded the Rs. 93,000. In what way was that question raised before it?

Mr. Wigram.—I consider the appeal to the Sudder to have been simply an appeal against the sale altogether.

Lord Brougham.—Of course, if there was a cross-appeal, it would be only an appeal against the sale; unless the party who was ordered to pay the rupees 90,000, cross-appealed, that point could not be raised upon the appeal. How did the respondent below raise that question as to the Rs. 93,000 in the Sudder Court?

Mr. Wigram.—I conceive, my Lord, that the Sudder Court considered that the whole case was open before them, as there had been an appeal.

Lord Brougham.—They considered it as if there had been a cross-appeal.

Mr. Wigram.—Under the Regulation the Sudder Commission had absolute discretion to do what they thought right.

Lord Brougham.—Each party must pay their own costs, both before the Mofussil Commission and on the appeal to the Sudder. The doubt we have is about the terms in which the Sudder dealt with the question of costs. They say, in a very awkward way, and apparently contradictory to the Mofussil decree, "Let the appellant be liable to costs according to the Mofussil decree." Now, when you look at the Mofussil decree, you find it is that he is not liable, nor is the other party liable, to costs, but that each party is to pay his own costs. So that saying "Let the appellant be liable to costs according to the Mofussil decree" means "Let the appellant be liable to pay his own costs, and let the respondent be liable to pay his own costs." So that in each stage each party is to bear his own costs from the beginning.

Vice Chancellor Bruce.—Each party is to pay his own costs in every stage of the proceedings.

Mr. Richards.—Each party is to pay his own costs in each proceeding.

Lord Brougham.—Yes; below, the East India Company was not a party, so that if costs had been given below, they would have come upon the respondent.

Mr. Wigram.—Your Lordships do not think that the costs should in any way be severed upon any part of the proceedings, considering the great injury we sustained by the sale?

Lord Brougham.—No.

Mr. Richards.—If my learned friend makes any suggestion as to costs, I would take the liberty of suggesting this:—I should have considered that this was like a mortgagor coming to redeem, were he pays not only the interest, but also the costs.

Lord Brougham.—That would not apply to the costs of the appeal to the Sudder from the Mofussil, because if he had not appealed, the other party would not have appealed. Therefore, it was his own fault going to the Sudder. It is quite different from a mortgage being set aside. If the sale had not been set aside, you would have made an application with some chance of success upon that ground. But here the sale is set aside.

Mr. Richards.—Each party pays his own costs in each proceeding. Will your Lordships please to name any time within which the money is to be paid by the East India Company?

Lord Brougham.—We have this difficulty about that—it is subject to the Governor-General.

Mr. Richards.—We will take it in the usual way "forthwith."

Lord Brougham.—You had better say nothing about that, because if you drive a party who has a right to say “yes” or “no” to the wall in point of time, it is possible that he may say “no.”

Vice-Chancellor Bruce.—I think you may have liberty to apply to the Sudder Commission.

Mr. Richards.—Just so, with liberty to apply to the Sudder.

Lord Brougham.—If we were to say that it is to be paid within six months, it is possible that they might grudge this Rs. 27,000 to be added to the Rs. 93,000.

Vice-Chancellor Bruce.—Each party is to bear his own costs of every stage of the proceedings, from their first commencement before the Mofussil Commission to the present time, with liberty to apply to the Sudder Commission.

The 12th December 1842.

Present :

Lord Campbell, Mr. Baron Parke, Mr. Justice Erskine, Dr. Lushington, Sir E. H. East, and Sir A. Johnston.

Limitation—Clause 2 Section 7 Regulation V. 1827 of the Bombay Code.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Jewajee and others,

versus

Trimbukjee and Jagojee and others.

Where a case was held to be within the exception contained in Clause 2 Section 7 Regulation V. 1827 of the Bombay Code (Limitation of Suits) by reason of a claim preferred to the authority that was then the supreme power in the State, although a satisfactory and binding decree was not obtained.

Lord Campbell.—IN this case their Lordships cannot take the same view of the subject that has been taken by any of the Courts below ; and their Lordships must rather regret that the Judges below did not look a little more accurately into the pleadings, to see what questions were to be determined, and a little more accurately to the language of the Regulations of Bombay, by which one of the questions was to be decided.

Their Lordships are of opinion that it lay upon the plaintiff, the now respondent, to shew that he was entitled to one-half of the family property. That he could only do by evidence of adoption. Now, the only evidence of adoption that is brought forward is the sunnud, and that is represented as the judgment of a Court of competent jurisdiction—I mean the sunnud, together with the documents belonging to it. But their Lordships are of opinion that that cannot be considered as the judgment of a Court of competent jurisdiction, because it was an intimation to one party that there should be a judgment in his favor, whereas there was an intimation by the same authority to the other party that the cause remained undecided, and that, when the particular object was gained which was in view when this sunnud was granted, then the Sudder Court would proceed, and there should be an adjudication between the parties ; this came from the same authority. We cannot, therefore, consider that that was a judgment binding and conclusive upon the parties.

Nor is there any admission here by which the right of the plaintiff to one-half can be considered as established, because, even supposing that the person by whom the admission was given could represent the other party, he made the admission under the authority of the Government for a particular purpose, and neither he nor those whom he represented can be considered as bound by it. There therefore appears to be no evidence whatever of adoption, and therefore no evidence that Chandjee, the original plaintiff, was entitled to one-half of the family property.

The next question that arises is with regard to the Statute of Limitations, and their Lordships are of opinion that, although the sunnud is not to be considered as a judgment binding between the parties, yet that that, taken with reference to the other documents connected with it, is sufficient to bring the case within the exception that has been relied upon, for it shews sufficiently that there had been a claim preferred to an authority that had to try and to decide the question, because we must consider that the Court to which this application was made was then the supreme power in the State, and had authority to decide between the parties.

It is objected, however, that another condition is not complied with, namely, that there is not sufficient proof given of how it was that a satisfactory and a binding decree was not obtained. But we think that, although that sunnud cannot be considered *per se* as a binding and regular judgment, it is enough, coupled with the admissions that were afterwards given, to account for the party not having proceeded to obtain the judgment of the Court itself, particularly coupled with this fact, that he was admitted into occupation of part of the property.

Under these circumstances, their Lordships are of opinion that the justice of the case is, and that we shall be fully authorized in recommending to Her Majesty to remit the cause to the Court below, the Sudder Court, with instructions to them to divide the whole of the property in equal third parts. Chandjee had an opportunity of shewing that he was entitled to one-half; his attention was repeatedly called to that point; he was warned that it was necessary to prove the adoption; he has failed in doing so. It is admitted that there would be great difficulty now in bringing any further evidence. At all events, he has had the opportunity, and he has not availed himself of that opportunity; we are therefore of opinion that he and those who represent him must be content with one-third of the property; then the three appellants will take the second third, and the eighteen will take the other third.

With regard to the costs, we are of opinion that, as the three parties represented by Mr. Wigram were, from the beginning, perfectly willing that the estate should be divided upon the footing of each having a third, there ought to have been a decree in their favor in the first instance. We are of opinion, therefore, that the costs of those parties below ought to be paid according to the course which has been pursued upon these appeals. We are likewise of opinion that their costs of this appeal ought to be paid by the respondents. Therefore, the costs of the three appellants, both of the proceedings below and of the appeal, will be paid by the respondents. The other parties will pay their own costs.

The 12th July 1843.

Present:

The Lord President, Lord Brougham, Lord Campbell, Vice-Chancellor Knight Bruce, Dr. Lushington, Sir E. H. East, Sir A. Johnston, and Sir E. Ryan.

Jurisdiction—Caste—Religious Ceremonies (Adavi Palki).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Sri Sunker Bharti Swami,

versus

Sidha Lingayah Charanti.

Quære—Whether a suit lies in the Civil Courts against the Chief Priest of the Lingayats by the Swami or Chief Priest of the Smartava sect of Brahmins claiming by grant from the supreme power of the State the privilege of *Adavi Palki*, of being carried, on ceremonial occasions, in a palanquin borne crossways, so that the poles traverse the line of march.

Lord Campbell.—THIS is an appeal against certain judgments of the Zillah Court of Dharwar, and the Sudder Dewanny Adawlut, Bombay. The appellant, as

Swami, or Chief Priest of a college of the Smartava sect of Brahmins, claims, by grant from the supreme power of the State, the privilege of *adavi palki*, of being carried, on ceremonial occasions, in a palanquin borne crossways, so that the poles traverse the line of march.

The respondent claims the like privilege as Chief Priest of the Lingayats, worshippers of the goddess Siva, whose symbol, the *linga* or phallus, they are said to adore.

The suit arose from the respondent, in the month of July 1835, at a great religious festival, at Hoobli, in Bombay, having been carried through the bazaar in his palanquin crossways, attended by a great crowd of Lingayat followers, in sight of large numbers of Smartava Brahmins, who, denying the right of the respondent to this privilege, considered the assumption of it an insult to their sect. In consequence, on the 17th of May 1836, the plaint was filed by the appellant in the Zillah Court, asserting his own right, complaining of the usurpation of the respondent, claiming damages, and praying an order in the nature of an injunction that, in future, the respondent should not be carried in a palanquin crossways.

Their Lordships see great reason to lament the manner in which the suit has been conducted and disposed of both in the Zillah Court and in the *Sudder Dewanny Adawlut*. After a protracted litigation and an enormous expense, they are not now enabled to decide the rights of the parties, and they are driven to remit the cause for further consideration and enquiry.

The Judges below had a plain course to pursue: to consider, first, whether, assuming the facts alleged to be true, they had jurisdiction to entertain the suit, and, if they had, then giving the parties the opportunity to adduce their evidence, to see whether the right claimed by the appellant was established, and that claimed by the respondent was negatived. But no distinct opinion is expressed by them respecting the law of the case, whether the action is maintainable or not, and important evidence being excluded, the facts are left in a state of great uncertainty, so that we cannot venture, with any safety, either to affirm or reverse the judgment by which the appellant is said to have been non-suited. We do not expect to see proceedings in the native Courts in India conducted with technical form and precision; but the suitors ought to have the benefit of the exercise of industry, caution, and intelligence on the part of the Judges.

In this case it was proposed by the appellant to examine certain witnesses who had lived and enjoyed sovereign authority in the territory over which the disputed right was to be exercised. There appears great reason to believe that the evidence of these witnesses might have been obtained in a shape in which it would have been admissible, but the Judge of the Zillah Court, without sufficient reason, would neither allow the interrogatories to be transmitted for their examination which had been prepared by the *vakeel* of the appellant, nor frame interrogatories in due form himself, which it is certified to us that it was the duty of his office to have done.

On the 21st of October 1836, he made the following order:—"The defendant's objections have been fully weighed, and it does not appear right or proper to forward the questions aforesaid to Maharaj Appa Sahib, &c. Even if they were sent, it does not appear to the Court that they would go to prove the plaintiff's case." The meaning of this last observation their Lordships are unable to understand, as the questions go directly to establish the grant of the privilege and the exercise of it, as alleged by the plaintiff, and to prove that no such right had been exercised by the defendant or his predecessors.

However, on the 24th of October 1836, the Judge pronounced a decree against the appellant, finding "that he should have produced a *sunnud*, and have proved that immemorial usage had been in conformity to the *sunnud*; that the evidence adduced by the plaintiff as to his enjoyment of the privilege was deficient both in substance and quality, and by no means amounted to proof that the evidence

"produced by the defendant was as strong in his favor in this particular; that the plaintiff's claim was disallowed, and that he should pay all the costs of the action."

On the 21st of November 1836, a petition was presented to the Zillah Court for a new trial, on the grounds of the rejection of evidence and the discovery of two copper shasuns, sunnuds or grants by the Rajah of Anagoondy 538 years ago, whereby the adavi palki was granted to the High Priest, under whom the plaintiff claims. But the Judge determined "that there seemed to be no reason at all for a new trial, and that the prayer of the petition should not be complied with."

The plaintiff thereupon appealed to the Sudder Dewanny Adawlut, and prayed that his shasuns might be received in evidence.

The shasuns were in the Nandi Nagri character, now almost unknown. The Court, without any proof of the place where they had been kept or found, received them in evidence, and ordered them to be translated into the Mahratta language. They professed to contain a grant by the Rajah Vidyarana, the priest whose successor the plaintiff claims to be, of (among various other privileges) the adavi palki, being carried crossways in a palanquin.

The translation being received, the Court resumed the consideration of the case, and, on the 26th of September 1837, made the following interlocutory order:—"The sunnuds were translated as ordered. From these it would appear that Vidyarana has had the privilege of going through the country in a palanquin sitting crossways. Appellant is called upon to prove that this privilege has been enjoyed since the date of the sunnud by Vidyarana's heirs. It is also to be proved that he is Vidyarana's heir. Respondent is to be allowed to produce evidence to refute it;" and a reference was made to the Zillah Judge of Dharwar to take depositions on this issue.

A great number of witnesses were accordingly examined, and certain documents were produced on both sides.

At last, on the 24th of January 1838, Mr. Pyne, one of the Judges of the Sudder Dewanny Adawlut, gave his written opinion in favor of the appellant. After going through the evidence, he thus concludes:—"On a review of this case, traditional evidence would lead to the belief that Sri Sunkur Bharti is a lineally-descended Gooroo from Vidyarana, on whom the privilege of sitting in a palanquin carried crossways was bestowed by Kudumber Row, Raja of Syadree Desh, in Saka 1217. That the possession of a sunnud to this effect by the appellant is confirmatory of such being the facts; that the documentary evidence produced by the appellant shews that for nearly three-quarters of a century the Gooroos from whom he inherits were styled by the Peishwa as Swami of Sringirimath; and that, lastly, the local European authority in Mysore has recorded it as his opinion that the appellant has the exclusive distinction of sitting in a palanquin carried crossways. On the foregoing grounds, and as the respondent has adduced no proof whatever in favor of his usurpation of this honorary distinction, I would amend the decree of the Zillah Court by awarding nominal damages to the appellant, and prohibiting the respondent from having his palanquin carried crossways; and even did I not do so, I would desire to refer a case of such importance to a Full Court."

Therefore Mr. Pyne was for reversing the decree of the Zillah Court by deciding in favor of the appellant upon the evidence as it stood, without any enquiry as to the genuineness of the sunnuds, or any strict proof as to the enjoyment of the right.

But on the 21st of February, Mr. Simson, another Judge of the Sudder Dewanny Adawlut (who had been the Judge to decide the case in the Zillah Court) gave his opinion in favor of the respondent, concluding in these words: "From the foregoing, I am prepared to reject the appeal; 1st, because the evidence upon which it is attempted to set aside the decree of the Lower Court has been brought

“forward in an informal and suspicious manner, so as to require its being received
 “with caution, if received at all; 2nd, the copper plates produced by the appellant
 “are not legal evidence; 3rd, whatever may be the immunities bestowed on the
 “original grantees, the grants do not appear to me hereditary or exclusive; 4th, I
 “do not consider the appellant to have proved his descent from the grantee. I
 “must be permitted to add my hope that the Court will not, on such evidence, con-
 “firm an attempt to obtain a most monstrous monopoly over a rival sect, embracing
 “by far the greatest part of the population, and one of whose religious ceremonies
 “(the vyasan thor mandi kol) has been recently put down by the strong arm of
 “power, because distasteful to the party now claiming the exclusive right of found-
 “ing their spiritual pastor in a form to which the respondent considers himself
 “equally entitled.”

Mr. Greenhill, the Third Judge, followed on the same side. After comment-
 ing on the appellant's case as originally brought forward, he says:—“After the case
 “was decided in the Zillah Court, where he did not even seem to have been aware
 “of their existence, he produced two copper deeds written in old characters, which,
 “having been translated, offer to confer on the person named certain honors, one of
 “which is, that he may ride in his palanquin carried crossways, as it has been trans-
 “lated.

“These deeds have every appearance of being genuine, and supposing them to
 “be so, and that the appellant is the representative of the grantee therein named,
 “and they do not appear to prohibit other persons from riding in their palanquins
 “in the same manner, the same sunnuds give the right of riding his horse in a par-
 “ticular manner, and of using an umbrella; but it is not for a moment to be sup-
 “posed that no other person was ever to be permitted to use an umbrella, because
 “the honor was conferred upon the individual alluded to. The use of palanquins,
 “of horses, of umbrellas, &c., were, in former times, and indeed at this day, are
 “considered as marks of distinction when conferred by the Government, but I do
 “not see that a person so honored has any right of action against another who as-
 “sumes a similar pageantry, unless he can shew that it injures him unjustly. The
 “Government, being the source of all honors of this kind, may permit their use by
 “whomsoever they choose; and although it could probably by usage prohibit the
 “assumption, I am not prepared to allow that any private individual can interfere
 “with what is the natural right of all, so long as it neither injures nor interrupts
 “that person, and therefore am of opinion that the appellant should be non-suited
 “with costs.”

On the 23rd of February 1838, the Sudder Dewanny Adawlut pronounced final
 judgment, by which it confirmed the Zillah Judge's decree, and condemned the
 appellant in all costs.

This judgment their Lordships cannot confirm. It does not regard the ground
 of appeal arising from the rejection of evidence in the Zillah Court, and their Lord-
 ships think that an order should have been made allowing the appellant to have the
 benefit of the examination of the witnesses to whom the suppressed interrogatories
 were addressed.

Again, after the order of 26th of September 1837, Mr. Pyne could not be
 justified in treating the sunnuds as forged. Before that order was made, there cer-
 tainly ought to have been an enquiry respecting the custody of the sunnuds; but
 the appellant had reason to believe that their genuineness was admitted by an inti-
 mation from the Court that he was only to prove the exercise of the privilege and
 the spiritual pedigree.

Mr. Greenhill, who concurs with Mr. Simson in deciding against the appel-
 lant, considers the sunnuds genuine, and it is not quite easy to understand whether
 he proceeds upon the construction of the sunnuds, or on the ground that, in point
 of law, at all events, the action is not maintainable, although the other two Judges
 seem to have concurred in the contrary opinion.

It was strongly pressed upon us by the respondent's Counsel that we should take upon ourselves to decide that the action is not maintainable, and, on this ground, to affirm the judgment, whatever miscarriages there might have been in the conduct of the suit; but this ground of defence not having been taken before, and never having been solemnly considered by the Judges below, and no authorities from the law of Bombay having been cited to us, we cannot venture to give it effect. In England, although an action may be maintained for the disturbance of an office or franchise, an action could not be maintained by the grantee of a dignity from the Crown against a person who, without a grant, should assume the like dignity: but it does not necessarily follow that such is the law in Bombay. The usurper of the dignity is guilty of a wrong which is, to a certain degree, prejudicial to every one who has a just title to the dignity, and the manner in which such a wrong is to be redressed must depend upon the Municipal law of each particular country. There may be no remedy except by application to the Executive Government to punish the usurpation, or there may be a remedy to every one whose dignity is lowered by the usurpation in right of action against the usurper. Even in this country, it would appear that in ancient times, when armorial bearings were assumed without authority, the family who had a right to bear them might sue in the Court of the Earl Marshal, and might obtain an inhibition.

The right of *adavi palki* is of quite as substantial a nature; and the Western nations, who attach so much importance to titles, orders, and decorations, have no pretence for treating with levity the marks of distinction conferred by the sovereign authority and highly valued in the East; such as the right to wear a particular button, to use a fan made from a cow's tail, or to be carried crossways in a palanquin.

For these reasons, their Lordships cannot advise that the judgment should be affirmed, but they are by no means prepared to say that judgment should be given for the appellant according to the prayer of his plaint. How his case would have stood had the witnesses been examined whom he propounded, we cannot tell, but the evidence actually adduced in the Zillah Court was insufficient to establish his right or to negative that of the respondent. In the *Sudder Dewanny Adawlut* the *sunnuds* were brought forward under circumstances of great suspicion, and they ought not to have been received without enquiry into the custody from which they came, or other proof to shew that they were genuine. Nor has sufficient attention yet been given to the effect of them, or to the consideration whether the appellant, having made out his right and negatived the respondent's, has any remedy by action, or can only apply for redress to the Police or the Executive Government at Bombay.

Their Lordships, therefore, however much they may regret that litigation should be prolonged on such a subject, feel themselves under the necessity of advising that the case should be remitted to the *Sudder Dewanny Adawlut* for a new trial, each party paying his own costs of this appeal, and all other costs to be in the discretion of that Court at the conclusion of the suit.

Lord Brougham.—That is to say, all other costs, as well future costs, as those already incurred.

Lord Campbell.—Exactly. Their Lordships beg to express a wish that the Judges of the Court will, in the first instance, consider whether the action is maintainable, the allegations of the appellant, in point of fact, being proved; and if they are of opinion in the affirmative, that they will carefully enquire into the custody and genuineness of the *sunnuds*. Should these documents be forged, the appellant must fail; for whether the existence of a *sunnud* might be presumed from the immemorial exercise of the privilege, when he rests his case upon *sunnuds* actually produced, by them he must stand or fall. If the Court should be satisfied that the *sunnuds* are genuine, and that the privilege is conferred by them, the next enquiry will be whether the appellant is to be considered the successor of the grantee, and there has been enjoyment under them. Lastly will come the right

of the respondent; if that be negatived, *primâ facie*, by proof of non-exercise or interruption, the *onus* will be cast upon him of strictly establishing it.

Their Lordships trust that the Judges will use the necessary means for having witnesses of high rank, who would object to taking an oath, examined without oath according to the regulations now in force upon that subject, and having the interrogatories so framed as to elicit the truth from them without offending their dignity. The rights of the parties may thus be at last satisfactorily settled, and the character of our Indian Government for the enlightened administration of justice effectually upheld.

Lord Brougham.—It ought to be observed, with regard to that very important question, as to interrogatories to persons of high rank, upon which the judgment last comments, that even if the objection is not done away, which is most properly made on the ground of those persons refusing cross-examination,—for example, refusing to give the grounds of their knowledge of the *causæ scientiæ*, as they say in Scotland,—still you may take the evidence, and it would be a strong argument upon its weight, a strong argument to shew that it is of no weight, that they were not cross-examined.

The 8th December 1843.

Present :

Lord Campbell, Mr. Justice Erskine, Sir H. J. Fust, Dr. Lushington, Sir E. H. East, and Sir E. Ryan.

Hindoo Law—Joint Hindoo Family—Presumption of Joint Property—Adoption—Widow—Maintenance—Practice of Privy Council (Technical objections.)

On Appeal from the Sudder Court of Bengal.

Dhurm Das Pandey and others,

versus

Mussumat Shama Soondri Debiah.

Where a Hindoo family lives joint in food and estate, the presumption of law is that all the property they are in possession of is joint property until it is shown by evidence that one member of the family is possessed of separate property.

The purchase of a portion of the property in the name of one member of the family, and the existence of receipts in his name respecting it, may be perfectly consistent with the notion of its being joint. The criterion in such cases in India is to consider from what source the purchase-money comes.

An objection which, if taken, might have been cured, and which has not been taken in the Court below, cannot be taken in the Court of Appeal.

Although the exercise of an act of adoption by the widow of a Hindoo who died without male issue, and made in accordance with his request, divested the property from the widow and vested it in the adopted son, the widow sued for an undivided share in the joint property, and a decree made directing her to be put in possession. **HELD** that the widow must be assumed to have prosecuted the suit only as guardian for her adopted son; that the decree must be considered to be for his benefit; and that she was put in possession as trustee for him and accountable to him as guardian and trustee for the profits of the property, being entitled herself to a maintenance out of it.

Lord Campbell.—THEIR Lordships feel very much indebted to the Gentlemen of the Bar on both sides for the manner in which the case has been argued; it has been argued with the greatest ability and with great conciseness, and I must say that we are better assisted by the Bar when a case is so argued, than when the arguments are extended to an unnecessary length, and there are repetitions which only perplex us. I am sure nothing was omitted on either side that could assist the Court or be of service to the client.

This case is of a very intricate and perplexing nature, and it is utterly impossible to explain all the facts that appear in evidence before us. But we have the judgment of the Zillah Court, which appears to me to be framed with great care and caution, and I am glad to have an opportunity of saying so, because lately in another case, the case respecting the palanquin, I felt it my duty to

declare the regret of all their Lordships who heard the case, that much pains had not been bestowed upon it both by the Zillah Court and by the Court of Sudder Dewanny Adawlut. In this case it appears to me, and, I believe, to all their Lordships, that both in the Zillah Court and in the Sudder Dewanny Adawlut Court, the Judges have shown great industry, great circumspection, and great discrimination.

Now, the case really involves merely a question of fact. There is no disputed point of law that occurs in the case, and upon a question of fact we must give great credit to the judgment of the Court below, the Judge having an opportunity of seeing the witnesses, and of seeing the documents, and being better acquainted with the habits and customs of the people than we can be supposed to be.

This judgment of the Zillah Court in this case has been affirmed by the Court of Sudder Dewanny Adawlut; the Judge of the superior Court not in all respects taking exactly the same view as the Judge of the inferior Court, but confirming the decree of the inferior Court. We have to determine whether that decree ought to be affirmed or reversed; and after the most anxious consideration, their Lordships are of opinion that the only course that we can safely adopt is to affirm the decree.

It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property, and there can be no doubt that, under these circumstances, the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member of the family was possessed of separate property. Such evidence may be received, but their Lordships are of opinion that such evidence has not been given in this case with regard to any part of the property.

Now, what has been relied upon with regard to a portion of the property, has been chiefly that it was purchased in the name of one member of the family, and that there are receipts in his name respecting it; but all that is perfectly consistent with the notion of its having been joint property: and even if it had not been joint property, it still would have been treated exactly in the same manner. We have from the highest authority—from the authority of Sir Edward East and of Sir Edward Ryan, whose most valuable assistance we have in this case (and it gives me a confidence that I should not otherwise have felt)—that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. Here there has been no evidence given that the appellant had any separate property, or that it was from his funds that any part of the purchase-money was paid; therefore I think that so far, on this part of the case, no difficulty can be entertained, and that the whole of the property must be considered as joint property.

That being so, the widow is entitled to a third of that joint property, unless credit be given to this *ikrarnamah* which has been set up by the other side. The Judge of the Zillah Court, who must have seen it, who must have examined it, and who had an opportunity of seeing the witnesses by whom it was supported, and the witnesses by whose evidence the authenticity of it was impeached, came to the conclusion that it was a fabrication. The Judge of the Sudder Court was rather of opinion that it bore the seal or signature of the grantor; but that it had been obtained from him when he was incompetent to execute a deed. I must, for my own part, express that the leaning of my opinion rather is in accordance with that of the Judge of the Zillah Court. But at all events it seems to me that this is a deed to which no faith can be given, and that the two Courts were perfectly right in considering that it was not the deed of the grantor, and that it ought not to have any weight given to it.

We now come, therefore, to the question of *quantum*. Their Lordships are of opinion that the whole of the real property must be considered as joint property,

and the same as to the personal property, because, according to the Laws of the Hindoos, as in the Civil Law, no distinction is made between these two species of property. Their Lordships certainly have felt great difficulty respecting the amount of personal property, the cash supposed to be in the house, and it would have been satisfactory to them if, according to the course of proceeding in this country, a reference could have been made by the Court below to ascertain the amount. But we have reason to believe that such a reference would not have been made, and now at this distance of time it could not possibly be made, with any advantage.

To show the amount, there is a document produced, which, if genuine, is sufficient for the purpose; an inventory supposed to have been acknowledged by one of the parties against his own interest. The Judge of the Zillah Court, and the Judge of the Sudder Court, have both concurred in believing that to be a genuine instrument, acknowledged by the party. There is no doubt that it is subject to some suspicion, but we do not feel that we should be at all justified in saying that the Judge of the Zillah Court, and the Judge of the Sudder Court, came to a wrong conclusion: we feel ourselves bound likewise to consider that a genuine document, and if so, it proves the amount of the property to be according to that stated in the decree.

An objection has been made that, pending the suit, an act of adoption was executed by the respondent, whereby the whole property was divested from the mother and vested in her adopted son. Now, upon the authorities, there can be no doubt that that is the result of an act of adoption; because the property is in the widow from the death of the husband, till the power of adoption is exercised. Then that adoption divests it from the widow, and vests it in the adopted son. But for that reason are we to reverse the decrees of the two Courts? No objection was made in either of those Courts that the proper parties were not before the Court; if such an objection had been made, it might have been removed; and I think it is a safe maxim for a Court of Appeal to be governed by, that an objection which, if taken, might have been cured, and which has not been taken in the Court below, shall not be taken in the Court of Appeal.

We consider that the Judges of the two Courts below were right in coming to the conclusion that the *ijazutnama*, or deed giving the power of adoption, was a genuine deed. That likewise is subject to great suspicion, but it is supported by witnesses who, if believed, prove it to be genuine. Those witnesses were believed by the Judges below, and we see no sufficient reason why they should be disbelieved. That being a genuine instrument, there was a power of adoption, and it is always to be borne in mind that that deed goes along with the habits and feelings of the Hindoos; because we know that a Hindoo dying without male issue, would be most anxious before his death, by writing or by parol, to give a power of adoption, in order that the sacrifices which are required may be performed, and that his departed spirit may be introduced to a state of happiness.

Then, under these circumstances, what is the effect of the decree? It has been objected that the effect of the decree is to put the respondent in possession in her own right, of that which is divested from her by the act of adoption; but their Lordships conceive that, although the decree is not very skilfully framed in that respect, that is not the effect of it. All the facts being stated, it is assumed as matter of law, that, after she had executed the act of adoption, she prosecuted the suit only as guardian for her adopted son. Then as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered to be for his benefit, and that she is put in possession as trustee for him. He claimed, as I understand, an undivided share. She is to be put into possession of an undivided share; that share she will hold, accountable to him as his guardian and trustee, being entitled herself to a maintenance out of it. Some of their Lordships thought that it might be expedient to alter the decree with relation to that point; but upon the whole, after considering the matter more

maturely, their Lordships are of opinion that that is unnecessary; that the effect of the decree will be to consider the whole of this property as joint property; that this deed giving the power of adoption (the *ijazutnama*) is a genuine instrument; that she prosecuted the suit as guardian for her adopted son; and that the decree is in her favor in that right as guardian for her adopted son, and that therefore he will be entitled to call upon her to account for the profits of the joint property, of which she is to be put in possession.

Under these circumstances, their Lordships are of opinion that it will be proper to recommend to Her Majesty that the decrees of the Courts below be affirmed, and with costs. There are doubts upon the facts, but we are proceeding upon the ground that a forged instrument was given in evidence on the part of the appellants, that that has caused the litigation, and that there is no reason in the world why in this case we should depart from the common rule, that the appellant failing must pay the costs of the appeal.

The 5th February 1844.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Mahomedan Law—Deed of Gift—Legitimacy.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Jeswunt Sing-Jee Ubby Sing-Jee, and Chuttur Sing-Jee Deep Sing-Jee,

versus

Jet Sing-Jee Ubby Sing-Jee.

A deed by a Mahomedan in which he declared "I have adopted *A. B.* to succeed to my property" was held to be neither a deed of gift nor a testamentary gift to take effect after the death of the donor, there being a complete absence of any relinquishment by the donor or of seisin by the donee.

According to the Mahomedan Law, a child born in wedlock is deemed to be the child of the mother's husband.

Lord Langdale.—THIS case comes on upon an appeal from the Court of Sudder Adawlut at Bombay.

The appellant states in his plaint that he was entitled to the property in question in one form or another, as the adopted heir of Rana Ubby Sing-Jee, who died in the year 1825.

The respondent alleges himself to be the heir of the same person, and, as such, entitled to the property in question.

The claim of the appellant rests altogether upon the validity of a deed which is stated to bear date on the 26th of December 1821, and which is alleged to be an effectual deed of gift to him of the property in question: it is also alleged, on the part of the appellant, that if it is not to be considered a deed of gift, it is to be regarded as a will under which he is entitled, if the respondent be not the heir to the whole of the property, or, at all events, to one-third of it. It is, therefore, of the utmost importance to see what is the nature and effect of this deed: it is dated 26th of December 1821, and is signed by "Ubby Sing-Jee Deep Sing-Jee." The deed is short, and is in the following words:—"As I have divorced my wife, her son Jet Sing, by illicit intercourse, is hereby disinherited; I have therefore adopted you." Then there follow after the signature these words:—"I have adopted Rana Jeswunt Sing to succeed to my property and title; no one shall interfere in this adoption. I have also made provision for all my wives by assigning a portion of land for their maintenance; they shall not be annoyed in any way, but considered as the mothers of Jeswunt Sing, and so treated and maintained. I have no son, and the heir to the estate is my brother Rana Chuter Sing, whose son, Jeswunt Sing, I have adopted."

The first question to be considered is, whether this is a deed of gift which passes any property to the appellant, and that depends upon these words:—"I have adopted Rana Jeswunt Sing to succeed to my property and title;" and upon this subject their Lordships have been referred to Mr. Macnaghten's book, as to what is the meaning of a deed of gift, in which it is stated:—"It is requisite that a gift should be accompanied by delivery of possession, and that seisin should take effect immediately, or, if at a subsequent period, by desire of the donor." "A gift cannot be implied—it must be express and unequivocal—and the intention of the donor must be demonstrated by his entire relinquishment of the thing given; and the gift is null and void where he continues to exercise any act of ownership over it."

Now, in the first place, their Lordships feel great difficulty in saying that any gift absolutely was here intended. The words are, "I have adopted Rana Jeswunt Sing to succeed to my property." When is he to succeed—after his death? Where is the relinquishment or any giving up of the property? There is none. If these words were intended to pass the property, there is a complete absence of any relinquishment by the donor or of seisin by the donee; and therefore it appears to their Lordships that this instrument is not to be treated as a deed of gift.

Then arises the question, is it a will? We have again the same absence of his intention to give in words. He says he has no son, and he adopts somebody who may succeed. This son may succeed. Any other person may succeed if it is in the nature of a testamentary gift.

This case seems to be, in the very terms of it, almost similar to a case cited from page 124 of Mr. Macnaghten's Book, where the question was as to the effect of a document executed by a party "declaring his nephew to be his representative in proprietary right." The answer declares the document to be of no validity, "and cannot be available to confer any right of succession on the nephew, because it purports to constitute him the representative in proprietary right of the framer of it; in other words it declares him in general terms to have the right to the entire property belonging to the framer of the document after the death of the latter;" which is the only construction to be given to the words used here, "I have adopted Jeswunt Sing to succeed to my property." Such a declaration does not fall within any description of legal obligation, and has, therefore, no validity as to the creation of proprietary right. It is not, therefore, a deed of gift nor a testamentary gift to take effect after the death of the donor. It appears to their Lordships, therefore, that this document has no effect or operation whatever in giving any right of property to the appellant.

That being so, the appellant has no right on which he can recover anything in this case; but with a view to what is ultimately to be done in this case, it is necessary to consider the matter a little further.

This case is brought forward either upon the allegation that the defendant was a supposititious child, palmed upon her husband by Purtaba, pretending to be his mother for the purpose of obtaining this property, or else upon the allegation that the child of Purtaba was an illegitimate child, born by illicit intercourse with some other person than the husband, Rana Ubby Sing.

Now, with respect to the question, whether, being supposed to be the child of Purtaba, he was also the child of Ubby Sing, there has been a great deal of evidence gone into, contradictory in some parts of it, but which, quite independent of the conclusion of law, preponderates very greatly in favor of his being the child of Ubby Sing, and, as such, recognised by him. Independently of that, there was no denial that Purtaba was the wife of Ubby Sing, and there is no evidence which can be relied upon to show that the most ordinary presumption ought not to prevail in this case. This is the case of a child born in wedlock, and it must, therefore, be deemed to be the child of the husband.

The other part of the case, which supposes that this child is not the child of Purtaba, does, upon examination of the evidence produced, appear to us to be a

gross attempt at fraud and imposition. There is no evidence which can in the smallest degree be relied upon to support such a statement. The declaration of the husband in the instrument produced as the foundation of the appellant's claim admits it is not so, for he there speaks of him as "her son, Jet Sing, by illicit intercourse;" and though that declaration may not be a true declaration as to the allegation of illicit intercourse, it is conclusive against the supposition advanced by the appellant. There is not the least foundation laid for it, and nothing which can lead us to suppose why he should be induced to put forward such a case, evidently false, and having no foundation whatever.

It is not possible, however, to dispose of this case without making one observation at least upon the proceedings which have taken place in the Zillah Court, where evidence was brought forward to a very great extent. It appears that the Judge so far forgot that it was necessary to have the evidence brought forward under legal sanction and in public, in such a way that there might be the means of controverting it, that he imported, as a ground of his decision, something which came within his own knowledge. It is to be regretted that any such circumstance should have taken place, and still more is it to be regretted, when the case came before the Superior Court, the Sudder Dewanny Adawlut, that a circumstance of that kind should have been alluded to as one which ought, in the smallest degree, to have any effect upon the judgment of the Court. It was impossible to pass that by without making an observation upon it; but still, the other circumstances of the case are so clear that their Lordships see no reason why the decision which has been come to should, in any respect, be altered; that circumstance, if at all looked at, might have been worthy of further consideration; in another respect, if the case had not the character which it must be supposed to have, of a fraudulent attempt to defeat justice, and, considering the decisions which have been pronounced and the conduct which has been pursued by the appellant, their Lordships are of opinion that this appeal ought to be dismissed with costs.

Lord Brougham.—Including all the costs below; I suppose they have already been paid.

Appeal dismissed with costs.

The 13th May 1844.

Present:

Lord Brougham, Lord Campbell, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Lease—Construction—Onus probandi—Hindoo Law—Damages.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Maharaja Tej Chund Bahadoor, Zemindar of Burdwan,

versus

Sree Kanth Ghose and others.

Where a lease is not in writing, but the terms of holding are specified in a notification addressed by the lessor to his servants, such an acknowledgment is, as against the lessor, conclusive evidence of the terms of the agreement.

Where a lease for a fixed term of 7 years contains no words to import a continuance of the interest after the death of the grantee, nor any expressions which point to any earlier determination of the interest, the *prima facie* meaning is a continuance for 7 years, and that the lease did not terminate with the death of the original lessee, but survived during the remainder of the term to his heirs and representatives.

The *onus* is on the party who seeks to show that the transaction should be governed by Hindoo Law, that the *prima facie* construction is contrary to the Hindoo Law or the established custom of considering such contracts in Bengal.

In this case the lessor having, on the death of the lessee, granted a putnee of his whole estate including the farm in dispute, was adjudged liable to pay to the representatives of the lessee damages for the time they were deprived of the beneficial enjoyment of the farm, according to the increased rent which the new lessee had undertaken to pay.

Dr. Lushington.—THIS is an appeal from the Court of Sudder Dewanny Adawlut of Bengal, and the subject of the suit is a lease of the *pergunnah*

Monohur Shahi. It does not appear that any lease was granted in writing; but the appellant, the zemindar, states the agreement in the following terms, addressing it to the native servants; that "the mehal in question has been given in farm to "Ram Nidhee Ghose from 1210 to 1216, B. S. (1803-4 to 1809-10), a period of "seven years; he will receive petitions and kubooleuts, and take possession and "transact business according to rule. You will attend upon him and cultivate the "soil, pay rent, render papers, and not act contrarily in any way."

This is done in a notification bearing date the 13th of April 1803,—a notification addressed to all the native officers of the pergunnah. Such an acknowledgment coming from the appellant is, as against him, conclusive evidence of the terms of the agreement.

The original lessee, continued in possession for four years and two months, and died on the 11th of June 1807.

There is no dispute as to these facts, and the only question arising is one of law, *viz.*, whether, by the terms of the grant and the Hindoo Law, the lease terminated with the death of the original lessee, or survived, during the remainder of the term, to his heirs and representatives.

With respect to the construction of the grant, it is contended, on behalf of the appellant, that it contains no words which would necessarily import a continuance of the interest after the death of the grantee, and this may possibly be true. But, on the other hand, the lease is for the fixed term of seven years, and there are no expressions which point to any earlier determination of the interest. The *prima facie* meaning, then, is a continuance for seven years; and had there been any intention on the part of the grantor to have affixed any limitation, he ought to have done so by the insertion of qualifying terms. Had such been the intention of the parties, nothing could have been easier than to have added the words "provided the grantee so long live;" and if the party having the full power to engraft this qualification omits to do so, the general principles of law would be opposed to any implied presumption.

These are the general principles of construction which their Lordships would be inclined to apply to the grant; but as this is a transaction to be governed by the Hindoo Law, a contrary interpretation may prevail, if it be shown that the *prima facie* construction is contrary to the Hindoo Law, or the established custom of construing such contracts in Bengal.

The *onus* of proving the law must necessarily lie upon the appellant, who seeks to show that the contract should be governed, not by general, but by particular, rules.

The question, then, is narrowed to this point,—has the appellant proved the law governing Hindoo transactions to be such as he avers it is, by authority from any Hindoo books of law, or by decided cases? or has he shown that a construction adverse to his interests would be at variance with the established customs under which such property in that country has been always held and enjoyed?

As to the first head of proof, it may be very quickly disposed of. Neither here nor in the Courts below has any authority been cited from the text-books of Hindoo Law opposed to the decision of the Sudder Dewanny Adawlut.

2ndly.—With regard to decisions in the Courts administering Hindoo Law, there was in the Courts below one case cited which has been printed in the Appendix, p. 21,—Zoolfikar Ali *versus* Hossein. This case occurred in the Provincial Court of Moorshedabad in 1811, and was decided by Mr. Rocke. It does not, however, appear to have been considered as any authority upon the question of law by any one of the six Judges under whose cognizance this case from time to time has come. It is not adverted to by any one of them, and when the case itself is examined, it is doubtful whether it has any bearing on the main question. It is not clear that the grant in that case was for a term of years, and the suit was by the person who had become the security, and who did not appear to be the heir of

the former or original lessee. There is, then, no decided case adverse to the claim of the respondent.

Then, with respect to the third ground, *viz.*, the averment that the continuance of a lease, granted for a term of years, for the remainder of that term to the heirs of the tenant, deceased, is at variance with the established customs under which such property in that country is held, and might be very detrimental to the system. This argument wholly fails. It is not averred nor proved that the subsistence of the lease for its full term, although the original lessee should die during the currency, is an unusual occurrence in Bengal; nor is it said that the maintenance of such lease would be productive of injury to the community. Not one of the Judges has supported such an opinion; and if there had been any sound ground for such an opinion, their local experience could not have failed to suggest it. Mr. Courtenay Smith, pp. 86-87, who was of opinion that the respondents were not entitled to recover at all, founds his judgment, not on the general law, nor upon the supposition that mischief must always arise from the upholding a lease after the death of the lessee for the remainder of the term, but upon circumstances which he conceives may belong to this transaction; as the want of a specific condition for the continuance of the term after the death of the lessee, the youth of the heir, and the poverty, or supposed insufficiency, of the security. I may observe that none of these latter grounds were attempted to be insisted upon at the bar.

It is not necessary to prosecute this enquiry further, for their Lordships are well satisfied that the judgment of the Court of Sudder Adawlut, maintaining this lease according to the *primâ facie* meaning of the contract, is not contrary to the law or practice of Bengal, and so far from being detrimental to the just rights of property or due cultivation of soil, a holding which enables the lessee to expend his capital in the improvement of his farm, without the prospect of the due reward being lost to his heirs in case of his own death before the expiration of the term, cannot be otherwise than beneficial.

The present respondents are the heirs of that tenant; they have been deprived of the beneficial enjoyment of the farm for nearly three years, and their Lordships concur with the Court below in thinking that they are entitled to be indemnified for the loss accruing from the wrong done to them.

But a question remains as to who is liable to make good this loss,—the appellant, the Zemindar of Burdwan, the original proprietor and lessor, or the representatives of Suroop Chund Roy, who form another set of respondents in this case, Chund Roy having, on the death of the grantee of this lease, taken a putnee talook of the whole estate, of which this farm formed a part.

In the Provincial Court and the Sudder Adawlut there has been much litigation on this point, and much evidence taken; but it does not seem to their Lordships necessary to set forth the details of those proceedings. By the final judgment of the Sudder Adawlut, the Zemindar of Burdwan, the appellant, has been decreed to pay the damage which has accrued. He is the original and moving cause of all the loss which has befallen the respondents. Without due regard to the contract he had entered into, and whilst that contract was still subsisting, he demises to Chund Roy the whole estate, including this farm, for an increased rental. The Maharajah, indeed, contends that, in the kubooleut to Suroop Chund, he had stipulated for the observance of existing leases; but Mr. Harrington, at page 93, disposes of this argument by showing that this stipulation could not reasonably be extended to cover this grant; for if the old lease were to continue, there would be no source from which the new lessee could fulfil his engagement. Indeed, the whole of this argument, as to a prohibiting clause with regard to this lease, is utterly at variance with the main case of the Maharajah, namely, that the lease had expired by the death of the lessee.

The Maharajah has, therefore, by his own acts, and through the medium of others whom he has empowered to act, violated his own engagements, and thereby

occasioned great loss to the respondents. For this loss, their Lordships are of opinion that the Sudder Adawlut have justly made him responsible. The amount of the damages given appears to have been fairly fixed, according to the increased rent which the new lessee undertook to pay; they have given for the three years the respondents were dispossessed, Rs. 42,000, being the amount the new tenant undertook to pay,—certainly not an exorbitant estimate of the real loss. Their Lordships are therefore of opinion that the decree of the Court of Sudder Dewanny Adawlut must be affirmed, and with costs.

The 18th June 1844.

Present :

The Lord President (the Marquis of Lansdowne), Vice-Chancellor Wigram, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Pleading—Joint Hindoo Family—Division.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Moottoo Vijaya Raganadha Bodha Gooroo Swamy Perria Woodia Taver,
versus

Rany Anga Moottoo Natchiar.

According to Regulation XV of 1816 of the Madras Code, in a suit for possession of joint family property in which the title of the plaintiff depended on the fact of a division having taken place in the family, a distinct averment of division must be made in the cause, and a direction given by the Court for the production of evidence in proof of such an averment.

The parties having acted under a misapprehension of the law, leave was given to bring a new suit within three years.

Dr. Lushington.—THE present litigation is between the widow of the party who was last seized of the zemindary, and his great-nephew, and various suits appear to have been instituted with regard to the right to this property, and the claim of the parties put on various grounds; but their Lordships are of opinion that the whole question is now narrowed to a very short point.

In the Provincial Court, certainly, some notice was taken of the question whether any division had actually been proved to have taken place between the two brothers or not; and the Provincial Court were of opinion that there was not satisfactory evidence to establish the fact of the division. But when the appeal came to be brought before the Court of Sudder Adawlut, that Court came to a contrary conclusion, and decided this case in favor of the widow, on the express ground that the two brothers had become divided, and that, in consequence, this property, whether self-acquired property or not, according to their opinion and judgment, would belong to the widow, and not be inherited by either of the brothers, or the nephew, or the great-nephew.

With regard to the question of law, as far as the opinion of the Pundits could determine it, there seems to have been no difference; they have all stated, in substance, to this effect, that the right and title to the zemindary depended on the fact of division, and the fact of division, therefore, was and is a most substantial question to be determined in this case. Now, their Lordships find, upon an examination of all these proceedings, that the fact of the division has never been alleged in any of the pleadings. They find, also, that, according to the Regulations of 1816, the XVth Regulation, that the division ought to have been made a distinct point in the cause, and that an order ought to have been given for the production of evidence in proof of such an averment. Then it comes to this, that there has been no such averment, no such point made, and no such direction given; and how it was that the evidence came to be taken on the one side or on the other, with respect to the question of division, no satisfactory explanation has yet been afforded at the Bar.

Now, their Lordships entertain a very strong conviction of the absolute necessity of adhering to this Regulation, for it is, in the *first* place, a Regulation emanating from the highest authority, and is entitled to the force of law; and it is, in the *second* place, one, in their Lordships' judgment, of the utmost importance for preserving the regularity of the proceedings of the Courts in that country, and for preventing constant confusion and uncertainty as to what really are, or are not, the points in litigation, and to which the evidence is to be directed. They conceive that this Regulation has been most wisely framed, *first*, in affirmatively directing that the points on which evidence is to be taken shall be distinctly set forth, and that it shall be a duty imposed on the Court, if those points do not appear to be sufficient for the final termination of the litigation, that they should state distinctly, as a matter of record, the further points on which evidence is to be taken. Further, the Regulation, after having thus affirmatively stated what is to be done, goes on to state what shall not be done:—"In like manner, if proof shall be required on any other points in the course of the trial, such points shall be recorded on the proceedings, and the proper party shall be called upon for the requisite evidence, and no exhibit shall be filed or witness summoned, unless expressly declared to be in proof or refutation of some point upon which the Court may have directed that evidence should be taken."

Now, this Regulation, important as it is, and most clearly expressed, points directly against the course which has been unfortunately adopted in this case, because the point on which the whole case turns, and in the opinion of the Sudder Adawlut, beyond all question, the whole case was decided, never was alleged as a point in any of the proceedings, and evidence which was read in support of it never was directed or sanctioned by the Court.

It is, in the opinion of their Lordships, therefore, indispensably necessary, for the purpose of supporting and securing the compliance with, and securing, this most wholesale Regulation, that they should act in conformity with it; and, if they act in conformity with this Regulation, the inevitable consequence is, that they cannot sustain the decision of the Sudder Adawlut, because it is upon the ground of that point, as the point of division alone, on which that judgment rests.

But, looking at the whole of these proceedings, they do not think that it would be consonant with justice at once to reverse the decree of the Court below, and to affirm the decree of the Provincial Court. They think that the parties have unfortunately lost their way, and, on that mistake and misapprehension, it would be going too far finally to dispose of the case now.

For these reasons their Lordships are of opinion that the decree of the Sudder Adawlut must be reversed, but that leave should be given to the respondent to bring a new suit, notwithstanding the decree of the Provincial Court, at any time within a period presently to be specified, and after full communication of Her Majesty's Order in Council shall have been made to the parties interested, and though their Lordships can make no order on the subject, it would be exceedingly desirable that it should be known to all those who are interested in this property, that the question of fact, as to division or no division, appears to be the only point on which the main question of title to this property will ultimately depend.

Perhaps, Mr. Clarke, you can give their Lordships' information at what time the Order of Her Majesty in Council would be likely to arrive in the East Indies, how it would be known, and in what way information should be given to the parties.

Mr. Clarke.—I will take the opportunity of knowing precisely the course; a copy of the decree, I take it, will go out by the next mail, the 1st of July; it will arrive at Madras in the middle of August, and it will be immediately made known by the Court to the vakeels of the parties, and communicated to the Provincial Court, for the information of the parties, at their residence in the province.

Mr. Pemberton Leigh.—Would not the Court, in its regular course, give notice to the parties?

Mr. Clarke.—Immediately it arrives it would be communicated to the parties representing the suitors in the Sudder Adawlut.

Sir E. Ryan.—In this case the respondent is a pauper ; is it likely she would have a vakeel to represent her ?

Mr. Clarke.—Yes, my Lord ; paupers are always represented by vakeels.

Dr. Lushington.—We think three years is a proper time after the decree is received in India and disclosed to the parties.

Mr. Clarke.—The Court might direct that a copy of the decree should be furnished to the parties ; the Court always gives certified copies of its own decree to the vakeels of the parties, and I think it is the same with regard to the decree of the Council. I think a copy of the decree sent out from England would be delivered to the vakeels.

Mr. Moore.—Perhaps your Lordships would embody in your decree a direction to the Court itself to serve the parties.

Dr. Lushington.—Do they file the Order as being a copy of Her Majesty's Order in Council ?

Mr. Clarke.—Yes, my Lord, they do.

Dr. Lushington.—Then that will do.

Lord Brougham.—That will amount to three years from the 1st of September next.

Mr. Pemberton Leigh.—All the parties being represented here by their attorneys, they will have notice of it.

The 2nd August 1844.

Present :

The Lord President (Marquis of Lansdowne), Vice-Chancellor Knight Bruce, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Mahomedan Law—Marriage—Legitimacy—Inheritance.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Shums-oon-nissa Khanum,

versus

Rai Jan Khanum, for herself, and on behalf of her minor son Saadat Ali Khan.

If a child has been born to a father of a mother where there has been not a mere casual concubinage but a more permanent connection, and where there is no insurmountable obstacle to a marriage, according to the Mahomedan Law, the presumption is in favor of such marriage having taken place, and the mother and child are entitled to inherit.

Dr. Lushington.—THE claim in this case relates to the inheritance of the zemindary of Atiya, and claimants of that inheritance, at least all the claimants which it is necessary now to name, are two persons claiming to be the lawful widows of the deceased zemindar, one of whom claims also on behalf of her son, whom she alleges to have been the legitimate issue of the deceased person.

Both the Courts, under whose consideration the questions in the cause have been brought, have come to the conclusion that the claim preferred by Rai Jan, on behalf of herself and of her son, is a just one—in other words, they consider that there has been sufficient proof to justify them in determining that she was the lawful wife of the deceased zemindar, and that her son was the lawful son of that zemindar. It is hardly necessary to say that, before their Lordships could reverse the decree of two concurrent Courts, they must be perfectly satisfied that some legal miscarriage has taken place. But their Lordships are of opinion, in this case, that the evidence is decidedly in favor of the judgment to which those Courts originally came.

The question appears to be one depending upon the law with relation to Mahomedan property, and the proofs in support of the case as applied to that law.

Several references have been made to the work of Mr. Macnaghten upon this subject. It will not be necessary to read at length the part of his preliminary remarks to which reference has been made, and which indeed has been already done, but the substance of it appears to be this. After having stated what is the general opinion entertained upon the question, he says, "The Mahomedan lawyers carry 'this disinclination,' that is, against bastardizing, 'much farther, they consider it 'the legitimate course of reasoning to infer the existence of marriage from the proof 'of co-habitation ;' he then says,—'None but children who are in the strictest sense 'of the word spurious, are considered incapable of inheriting the estate of their 'putative fathers. The evidence of persons who would in other cases be considered 'incompetent witnesses, is admitted to prove wedlock, and in short, where by any possibility a marriage may be presumed, the law will rather do so than bastardize the 'issue, and whether a marriage be simply voidable or void *ab initio*, the offspring 'of it will be deemed legitimate.'"

It may be observed that this is the statement of Mr. Macnaghten, evidently after great deliberation on the subject, because he goes on to refer to what has been said by Sale, and he then observes:—"This, I apprehend with all 'due deference, is carrying the doctrine to an extent unwarranted by law ; 'for where children are not born of women proved to be married to their fathers 'or of females, slaves of their fathers, some kind of evidence (however slight) is 'requisite to form a presumption of matrimony." He then observes:—"The 'mere fact of casual concubinage is not sufficient to establish legitimacy ; and 'if there be proved to have existed any insurmountable obstacle to the marriage 'of their putative father with their mother, the children, though not born of 'common women, will be considered bastards to all intents and purposes." The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan Law, the presumption is in favor of such marriage having taken place.

We apprehend that, in considering this question of Mahomedan Law, we must, at least to a certain extent, be governed by the same principles of evidence which the Mussulman lawyers themselves would apply to the consideration of such a question. The first step in this case is the petition which has been so much commented upon at the bar, namely, the petition of Rai Jan, bearing date the 11th of December 1813. In that petition she states herself to be the wife of Fyz Ali Khan, and she sets forth the marriage settlement, without, indeed, ascribing to it any date or giving any date to the marriage. Having so done, she represents that the Khan was kept away and not permitted to return to his own home, that there were a number of persons who had attempted to confine her, and not to permit her to go to the Khan, and that he was about to marry another wife.

Now, this document appears to their Lordships to be a document of the very greatest importance ; for without going the length of saying that it is a true assertion of all the facts therein contained, it is at any rate an assertion of facts in conformity with the subsequent statement of this very person. The statement in this petition is made in the year 1813, before there is any anticipation of a litigation of this description, and it is made by her at a period when Fyz Ali Khan is not considered or deemed to be incompetent ; it is addressed to a competent Court, and she must, if she anticipated any good result from the presentation of that petition, have also anticipated that the facts contained in that petition might be the subject of judicial examination. She therefore offers in the year 1813 to subject her claim (which is in substance the same as her claim now) to the examination of a Court competent to decide upon it.

It appears that that petition was rejected—and we presume on the ground that, even supposing the whole facts contained in it to be true, yet that would be

no justification for the interference of the Court for the purpose of preventing the contemplated marriage.

In 1816 Fyz Ali Khan was placed under the protection of the Court of Wards. It is not necessary to go minutely into the question what was the precise state of his mind or of his intellects at that period. It is not distinctly raised in the course of the pleadings which were given in by the parties upon this occasion. But the result of the evidence appears to be that he was a person who had become much addicted to habits of intoxication, and that his intellects were impaired, though it does not appear in any part of that evidence that he had become what may be called an idiot. However, in 1816, his property and also his person were placed under the care of that Court, and proceedings have taken place which have been much relied upon in both of the Courts below in the determination of the question which came under their consideration.

The first document to which it may be expedient to refer is the report of Mr. Pakenham at page 19. Mr. Pakenham, in the discharge of his duty as Collector, is writing a letter to the Court of Wards proposing to them a settlement out of the estate of Fyz Ali Khan; and after having mentioned certain circumstances relating to the amount of property, he recommends the sum to be allotted for the expenses of Fyz Ali Khan and his family to be fixed at 200 rupees a month, namely, 120 rupees for Fyz Ali Khan, his two wives, and his mother, 30 rupees for the servants' wages, and 50 rupees for the support of a number of females who have long lived in, and been maintained by, the family, and to whom he states that a sum equal to what he proposes has been for some time past allowed. He adds:—"This last item I have not recommended without carefully ascertaining that there are such persons who, from having been all along supported by the zemindar, may be considered as entitled to an allowance."

Now, taking this as evidence of the fact that she was the wife of this party Fyz Ali Khan, it is evidence to this effect, that so far as Mr. Pakenham's investigation had extended, it justified him in making the representation which he made in the discharge of his duty to the Court of Wards. The Court of Wards acted upon that representation, and Rai Jan continued to receive an allowance after the rate of 10 rupees a month from the year 1817 up to the year 1824, when Fyz Ali Khan died.

It appears, further, that during this period Rai Jan was residing in the house of Fyz Ali Khan, or at least in that part of the building appropriated to women belonging to Fyz Ali Khan. All the evidence goes to that extent, and indeed it appears scarcely to be a point in controversy. In page 25, so far as it can be called evidence, there is the report of Mr. Scott who, it may be observed, is hostile to the claim of Rai Jan. He there states incidentally, for the purpose of justifying his advice, that the other wife should not be permitted to come into the household of Fyz Ali Khan, that this wife is now residing with him. He says:—"Now, as your ward has one wife living with him, as far as I am able to judge, any intercourse with another, who has been so long absent, could in no degree add to his domestic comfort." It appears that Shums-oon-nissa, the other wife, the appellant in this case, had been residing separately from her husband for a considerable length of time, and that she had presented a petition for the purpose of being allowed to return to him, and the ground upon which the Collector advises against that petition being complied with is, that this wife, the present respondent in the case, was residing with him during that period, and that therefore the return of Shums-oon-nissa would be unnecessary and inconvenient. There are several other documents of the same tenor which it is unnecessary in the view of their Lordships to follow in detail, namely, the reports of the Collectors, Mr. Belli and Mr. Petree, at pages 36 and 37, and the report of the Collector, Mr. Lindsay, at page 40.

We apprehend, then, that in point of fact the case comes clearly and indisputably to this, that this person, Rai Jan, was actually residing during a period of seven

years in the female department of Fyz Ali Khan ; that, according to the statements, so far as we can make them out, she was so residing for a twelvemonth anterior to the birth of this child taking place ; that she so resided, recognized to a certain extent, undoubtedly, as the wife of Fyz Ali Khan, that the child was born under his roof, and that child continued to be maintained in his house without any steps being taken on the part of Fyz Ali Khan or of any one else to repudiate his title to the legitimacy as the offspring of Fyz Ali Khan.

If these facts be so proved, the question is whether the evidence is not sufficient to support the legitimacy of the present claimant Saadat Ali Khan, according to the law as laid down. In the opinion of the Law Officers which is to be found at page 214, the Law Officers, who were there consulted, expressed themselves to the following effect :—" Under the above circumstances, in the event of the proof " of these facts, that Mussamut Rai Jan associated with Fyz Ali Khan, and remain- " ed with the other females of the house of Fyz Ali Khan, and Saadat Ali Khan " was born of her venter ; being the offspring of the loins of the said Fyz Ali Khan, " as is to be clearly understood from the proceedings of the Appeal Court of Ju- " hangeer-nagur, dated the 20th September 1831." They then go on to say that he would be the lawful child of Fyz Ali Khan, and that he and the mother would be entitled to claim their share of the inheritance.

Now, all the facts which are there stated upon the principle of assumption, appear to us to be maintained by the evidence in this case, namely, that Mussamut Rai Jan did associate with Fyz Ali Khan ; that she did remain with the other females in the house of Fyz Ali Khan ; that Saadat Ali Khan was born of her venter ; and as to his being the offspring of Fyz Ali Khan, we think that is a circumstance necessary to be inferred from the previous fact.

With reference, then, to the law as laid down by Mr. Macnaghten, and which appears to be acknowledged at the Bar to be the true law, without going into the question of the oral evidence whether there was an express acknowledgment of this child by Fyz Ali Khan as his son or not, there seems to be that which is at least tantamount to any oral evidence of any declaration whatever, because there is a consecutive course of treatment both of the mother and of the child for a period of between seven and eight years, under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment could have been adopted except upon the presumption of the co-habitation, and of the son being the issue of the loins of Fyz Ali Khan. But their Lordships are not disposed to think that the whole of the testimony, with regard to the verbal acknowledgment of Saadat Ali Khan, ought to be rejected. It is not necessary, however, to decide the case upon that ground, because we think, for the reasons we have stated, and without receiving as evidence that which is not legitimate or credible evidence, there are sufficient facts either admitted by both parties or proved by the treatment and the whole *res gestæ* in the case to bring it within the principles of law which have been already adverted to, and that therefore the judgment of the Court below must be affirmed with costs.

Decree affirmed with costs.

The 13th December 1844.

Present :

Lord Langdale, Mr. Baron Parke, Dr. Lushington, T. P. Leigh, Sir E. H. East,
Sir A. Johnsont, and Sir E. Ryan.

Compromise—Evidence—Payment of consideration—money.

Chowdry Dabec Persad and Banec Persad,

versus

Chowdry Dowlut Sing.

According to the practice in India, the statement in a deed of compromise of the payment of consideration-money is not conclusive evidence of payment.

In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not.

Mr. Baron Parke.—THEIR Lordships are of opinion that in this case they ought to advise Her Majesty to affirm the decree of the Zillah Court. There is no doubt in this case that the deed of Rufanama, which was executed between the parties, affords evidence as to the only fact which we have to dispose of, by our opinion, upon the present case, namely, whether the 21,000 rupees, which were stipulated as the sum to be paid down upon the executing the compromise, were paid or not. There is no doubt that the Rufanama, which contains a statement of the fact that the 21,000 rupees were paid, is evidence. It is admitted, on both sides, that it was not conclusive evidence, as the statement of such a fact in a deed, under the seal of the parties, would be in a Court of law in England, but it is evidence as far as it goes.

Then let us see whether that evidence, which is *prima facie* proof of the payment, is or is not rebutted by all the circumstances of the case.

We think that, looking at the mode in which this case has been treated by the Judge in the Sudder Dewanny Adawlut, who must be supposed to be well-informed of the law and the practice in India in such cases, that the statement of such a fact in a deed of this description is *prima facie* evidence, that the money that was therein stated to be paid was paid at the time of the respondent's executing the deed. But he says :—"That it is an understood thing that, after documents are drawn out, money mentioned in them is paid, and therefore mention of the receipt of money is made in the document."

Now that being so, the inference that would be derived from the statement of such a fact in the deed is that the Rufanama must, *prima facie*, be considered as evidence that there was, at the time that the deed was executed, and as part of the same transaction, a payment of money. But that inference is completely rebutted by all the evidence in the case, and by the admission of the parties, because all the witnesses present at the time of the transaction of the execution of the Rufanama, either are silent as to the fact of the payment, or they expressly depose that no payment took place at the time.

The appellant himself admits in the proceedings that such was the fact, for he has stated in his answer to the plaint in the Zillah Court that the money was received without stating at what time—not stating that it was received at the time the deed was executed. In his rejoinder he makes a different statement, and says that the money was paid antecedently to the execution of the deed, namely, while the draft of the deed was being prepared. In his petition in the Sudder Court, he states that the money was paid at the time that the deeds themselves were prepared. Thus varying in his statement of the time and place of the payment of the money, but not stating in any of them that the money was paid at the time the deed was executed.

Therefore the question now is this—The *prima facie* inference arising from the statement in the deed being rebutted, how stands the evidence with regard to

the fact of the payment? The witnesses who depose to the execution of the Rufanama state that the plaintiff, upon that occasion, admitted that he had received the money at an antecedent time. Now, is that fact proved? If that fact had been proved that the money had been paid at an antecedent time, not immediately at the time of the execution of the deed; but whilst the deed was being prepared, is it probable that such a sum as that would have passed from the one to the other without some receipt being given?

Then it is afterwards alleged by the appellant that the payment took place in the presence of respectable witnesses. Now those witnesses were not called in the Zillah Court, nor is any mention made of them in the petition of appeal. But in the petition of review it is stated as a fact that the plaintiff had offered to bring forward those respectable witnesses before whom he said the payment took place, and that the Judge of the Inferior Court, the Ameen had refused to receive them. Now it is impossible for their Lordships to believe that such could have been the case; because it appears that the proceedings before the Ameen are conducted with regularity, according to the regulations prescribed by the East India Company. Amongst those regulations it is ordered that every document should be on the file of the Court; and if there had been any petition to examine those witnesses, there is no doubt that there would have appeared, upon the files of the Zillah Court, some durkhast or petition for the examination of those witnesses. Therefore it is impossible that their Lordships can believe that any such application had been made to the Ameen. Then there is an admission by the defendant that there were those respectable witnesses who might have been brought forward; and the circumstance of his not bringing them forward is exceedingly strong that no such fact took place as that there had been, antecedent to the Rufanama, the payment of the sum of money.

Then, besides all this, it is insisted that there are some circumstances from which it is to be inferred that this payment took place, because it is said in the first place that, at the time when the instalments stipulated for in the deed of compromise were paid, no mention was made of the fact of the large sum of 21,000 rupees not having been paid. Now that is a fact certainly which at one time weighed with their Lordships, and which it appeared desirable to have explained, and explanation is given of the fact by the evidence of Ghunsam Loll. Ghunsam Loll is a person to whom both the Judge of the Inferior Court and the Judge of the Sudder Dewanny Court give credit; both of them have stated that they acted upon his evidence, and therefore they must have formed an opinion that his evidence was worthy of belief, and they are much more competent to form an opinion than we are. Then, if that evidence is believed, not only is that fact explained satisfactorily to our minds that no mention was made of this sum not being paid at the time the instalments were paid, but the evidence is also most material to show that no payment ever took place at all.

With regard to the circumstance of the payment of the instalment of 4,000 rupees, without any observation being made at the time, as insisted upon by the appellant, this witness says that, at the time the payment was made, the respondents, that is, the present appellants, said it was difficult to pay at once 21,000 rupees. He states that, "at the time of the receipt of 4,000 rupees, this conversation took place between them—'What do you say now about the payment of the 21,000 rupees in cash mentioned in the document?' Respondents in answer said, 'It is difficult to pay at once rupees 21,000. We shall arrange for it; and when the money is paid, we shall take a receipt.'" Therefore it is clear that at that time there was mention made of the non-payment of the large sum of 21,000 rupees. The Kazi, indeed, as Mr. Buller has observed, when he is interrogated as to the same conversation, says that none such took place. But in estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it

did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time.

Another circumstance which also had weight with their Lordships at one time is the delay in the institution of the suit. That circumstance is no doubt deserving of consideration. It may have been that they were prevented from instituting the suit sooner by delusive and evasive promises made from time to time. The mere circumstance of the delay in the suit is a circumstance of some weight, but not of any great weight when we look at the other facts of the case.

Their Lordships are of opinion that the burden of proof which lay upon the appellants, of showing the payment of the money, has not been discharged. They have given some *prima facie* evidence of the payment, but that has been rebutted by the other evidence in the case, and by the consideration that, if it had been true, there were witnesses who could have placed the fact beyond dispute had they been called. It is not likely that the payment of so large a sum, which would require, according to the habits of the natives of India, a considerable time to effect, could have taken place without some persons being present who could have proved the fact. Upon the whole their Lordships are of opinion that the judgment of the Sudder Court, and also the judgment of the Ameen, are perfectly right, and therefore that the decree ought to be affirmed with costs.

Decree affirmed with costs.

The 8th February 1845.

Present :

Lord Brougham, Vice-Chancellor Knight Bruce, Dr. Lushington, T. P. Leigh, Sir E. H. East, Sir A. Johnston, and Sir E. Ryan

Religious Ceremonies—Jurisdiction.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Namboory Seetapaty and others,

versus

Kanoo Colanoo Pullia and others.

Quære.—Whether the Courts in India have any jurisdiction to determine a question involving a mere declaration of a right to perform religious ceremonies.

Lord Brougham.—BEFORE stating what the judgment of their Lordship is, it is necessary that I should, upon two points, guard it from the possibility of misconstruction. One of these points is exceedingly important in this case, and with a view to the merits of cases of this description. The other is of equal importance with a more general view, in reference to other proceedings, and other cases at large.

In the first place, their Lordships wish to guard very carefully against its being supposed that in what they are about to do, namely, to reverse all the three previous decisions,—the decisions, that is, of the Zillah Court, the Provincial Court, and the Sudder Adawlut Court,—they give any opinion whatever upon the question, whether those Courts had a right to proceed, or had jurisdiction to proceed to the determination of the question as a matter of law merely. Whatever the inclination of their Lordships' opinion may be, that not having been the subject of argument, of discussion, or of decision below, they do not consider that upon that point they are entitled, or that they are called upon, to give any judgment, and they gladly withdraw from it.

The other point is with respect to the operation of that most beneficial Regulation in Section 3 (to which I would add Section 4, for that is even stronger and clearer than the third, showing distinctly that it is not directory, but mandatory and imperative) of the 10th Chapter of Regulation XV of the year 1816.

Holding the Regulation in that Chapter, generally speaking, but especially that part of it with which we are more particularly dealing here, to be a most wholesome and most beneficial Regulation, requiring to be most jealously guarded, and most carefully kept in view, and if possible, extended, as I hope it may be, to the other Presidencies (but that is my own private opinion merely), it would be highly inexpedient that any doubt should exist of the determination of their Lordships on all occasions henceforth, as on all occasions hitherto (and I allude particularly to a judgment which was pronounced last June by my Right Hon'ble Colleague near me, Dr. Lushington), to abide by and support that beneficial Regulation. Nothing, therefore, to be done to-day is to be taken as in any way impeaching or as doing otherwise than showing forth and testifying the high respect for that Regulation which their Lordships continue to feel.

Having made these preliminary observations, I have only further to state the opinion of their Lordships, in which we all agree, and in which we have the concurrence of the able and learned persons who are the assessors of their Lordships in these Indian cases, that their Lordships think fit to determine that the plaintiffs not having, in their opinion, alleged any case of injury done to them by the defendants, upon which they were entitled to go into evidence, and not having, therefore, established any case for damages in their suit against the defendants, no question remained but one of a mere declaration of a right to perform certain religious ceremonies; that if the Courts below had jurisdiction to proceed to the determination of that question in this suit, upon which their Lordships guard themselves in their judgment, as well as in the prefatory observations which I have made, against giving any opinion, the plaintiffs have not produced sufficient evidence to establish such a right; that, under these circumstances, all the decrees, therefore, ought to be reversed, and the plaint to be dismissed (the reversal by the Sudder Court amounts in fact to a dismissal of the plaint, but it is not as it ought to be—a dismissal without costs), and that this decision should be without prejudice to the existence or the non-existence of the right claimed by the appellants in any other suit in which such a question may be properly raised.

It is fit that I should add, in order to prevent all mistakes, and all applications to us henceforth on the subject, that the result of the decision of their Lordships clearly is, that all the costs of each party must be borne by that party himself, both in the Zillah and Provincial Courts, the Sudder Court, and here. We do not deny that there is a right to give costs in the way in which the Sudder Court gave them, but we do not think that this was a case for it. There is, also, no doubt a right here to give costs to the party supporting the decree, but it is very rarely done.

The 14th June 1845.

Present :

Lord President Wharncliffe, Lord Brougham, Vice Chancellor Knight Bruce, Dr. Lushington, Sir E. H. East, Sir A. Johnston, and Sir E. Ryan.

Punchayet—Boundary—Evidence—Practice (of Privy Council).

On Appeal from the Sudder Dewanny Adawlut of Bombay.

The Mokuddims of Mouza Kunkunwady, in Pergunna Jumcundi (the original Plaintiffs),

versus

The Enamdar Brahmins of Mouza Soorpal, *alias* Moorgnoor, in Pergunna Gotta (the original Defendants.)

The practice of the Privy Council has been never to favor objections merely of form.

An agreement between the parties to abide by the determination of a punchayet fixing the line of boundary, and the determination of the punchayet, were held to be not conclusive evidence so as to bar either party from showing the determination of the punchayet to be inequitable.

Vice-Chancellor Knight Bruce.—THEIR Lordships have felt, and even with the aid of the information communicated this morning by the appellants' Counsel, still felt some difficulty in following some parts of the proceedings below. With regard, however, to the objections merely of form taken here on the part of the appellants, after considering them, and especially giving due weight to Mr. Buller's observations upon the reference made by the Sudder Judge to Chapter 2 Section 34 of Regulation XVII of 1827, and upon the fourth and fifth Sections of Regulation VI of 1830, their Lordships, though not thinking those objections unreasonably taken or without colour, do not feel disposed to accede to them.

The tendency of the Judicial Committee since its institution, and of the Privy Council before, has been not to give way unnecessarily to objections of that nature. And in the present instance, the nature of the jurisdiction whence the appeal comes, the nature of the proceedings themselves, and the course pursued by the appellants below, render it right, in their Lordships' judgment, to deal with the matter before them upon its substance and its merits. And the case so viewed has mainly two questions: *First*, ought the Court below to have treated the decision of the punchayet as correct and binding? *Secondly*, if not, have the Collector, or Sub-Collector, and the Court of Sudder, adopted the right line of boundary?

Upon the first question, the appellants have conceded that the decision of the punchayet is, by the Bombay Regulations of 1827, prevented from having the force of a judicial sentence or judicial determination, or of a regular award in a technical sense; while the respondents, on their side, have not denied that it is receivable in evidence, and to be considered as part of the materials in the cause. But its conclusiveness, denied by them, is asserted by the appellants, who insist that there was a binding agreement between the parties to abide by the punchayet's opinion and determination, which the appellants say ought to be upheld. Their Lordships, however, are of opinion that, if there was in effect an agreement to abide by the punchayet's opinion and determination, and if the opinion was expressed, and the determination made by those who, it was agreed, should do so (a point not necessary to be decided), it was, nevertheless, and is the right of the respondents to contend that the agreement and determination do not necessarily bind, and to bring forward all the circumstances of the case, for the purpose of showing it to be inequitable that they should bind. In a word, to resist the appellants' demand so far as it rests on what the punchayet did, on grounds analogous to some of those on which the specific performance of an agreement may be resisted in English Courts of Equity. What may be the rule in the case of an effectual reference to arbitration, and an award, properly so considered, their Lordships do not think it necessary to say, for, in their judgment, having regard to the Bombay Regulations of 1827, and the undoubted facts of the case, an effectual reference to arbitration, and an award, properly to be so considered, did not exist in the present instance; though, if there had been an award, their Lordships are not satisfied that grounds do not appear upon which it is invalid, or might have been set aside. Viewed as a matter of agreement, it is their Lordships' opinion, from the circumstances of the case, and the whole course of proceeding, that reliance cannot be placed on what the punchayet have done, and that it would be unjust to enforce their decision against the respondents.

With regard to the true line of boundary, their Lordships think that there is sufficient evidence to show that fixed by the punchayet not to be the true line—a conclusion which they do not solely form from the circumstance that it did not accord with the case alleged on either side. That the line fixed by the judgments against which the appellants have appealed is the true line, does not, in their Lordships' view, clearly appear; but the evidence does not prove any other line, or make any other line more probable. Assuredly the appellants have not established that either of these judgments is substantially wrong, and as Mr. Shaw appears to have examined the surface of the disputed land himself, and to have bestowed care

and attention upon the subject, and it does not seem likely that any further investigation can materially advance the cause of truth or justice, their Lordships on the whole consider the right course to be to dismiss the appeal without costs.

Appeal dismissed without costs.

The 3rd December 1846.

Present : -

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Agreement—Compromise—Costs—Practice—Appeal—Forma pauperis.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Munni Ram Awasty,

versus

Sheo Churn Awasty.

Where, during the pendency of a suit, the plaintiff, in consideration of rupees 2,000, executed contemporaneously a *farigh-kutti* or relinquishment of the claim made by him in the suit, and an *ikrar-nama* or engagement to deliver in a *razeenama* or deed acknowledging himself to be satisfied,—HELD that the *farigh-kutti* and *razeenama* amounted to a decided agreement for the settlement of the action; and that, although the plaintiff sued as a pauper, yet, as it was questionable whether he should have been allowed to sue as a pauper, and as he had failed to perform his duty according to his engagement in entering up a *razeenama*, he was liable to pay the consideration-money of the costs incurred in consequence of his unsuccessful and apparently most unjust litigation in reference to his claim which he had instituted and carried on for the purpose of freeing himself from the obligation which he entered into by this *farigh-kutti*.

Quære.—Whether the leave given by the Courts in India to a party to sue *in forma pauperis*, would enable him to prosecute the appeal to the Privy Council without obtaining the leave of the Privy Council.

Lord Langdale.—THIS is an appeal from the Court of the Sudder Dewanny Adawlut, in a suit in which the appellant was the plaintiff, originally in the Provincial Court of Patna. He alleged himself to be one of a numerous family, which had not been divided or in any way separated. He claimed to be entitled to a certain share of what he stated to be the common and undivided property of the family. The plaint was filed so long ago as the month of January in the year 1815, and the answer put in by the defendants then, the respondents now, to that action, contained a denial of the plaintiff's right; a replication and rejoinder were filed, the parties proceeded to the examination of some witnesses, and there were, I think, two examined on the part of the plaintiff, and one witness examined on the part of the defendant. There had been directions given for the production of some documents, which, however, were not produced, in consequence of their having been, as was alleged, lost or destroyed by fire.

It was in that state of things that a proposal for a compromise seems to have been made. It does not distinctly appear from whence that first proceeded, nor is it in any degree material. It came to a conclusion in the month of April 1819. It does not appear to have been entered into with any haste or precipitation; on the contrary, sufficient time was taken for deliberation, the time which was asked for, for the plaintiff himself, in order that he might choose what he considered a lucky day for the completion of this assignment to him; but on the 26th of April he signed two documents, one of which is called a *farigh-kutti*, and the other an *ikrar-nama*. In the *farigh-kutti*, after the introductions which do not appear to be material to be stated at length, he says:—"I have, therefore, with my own free will and consent, settled this action among ourselves. By the terms of this settlement the sum of 2,000 rupees account, mine and my brother Doorga Awasty's eighth share, after deducting Sungun Lal's debts," and so on, "is due to me and to my brother by the defendants aforesaid, which, that is, the sum of 2,000 sicca rupees in question, I have taken from the defendant aforesaid, and have received, and have appropriated and applied it to mine and my brother's

"uses, and have relinquished and withdrawn the residue of my claim in the above-mentioned case, property, dwelling-houses, orchards, and villages. Now, neither I nor my brother, nor our successors, have or shall have any right, title, claim in, or litigation for, the property, articles, cash, dwelling-houses, orchards, estates, or villages aforesaid, the possessions and occupancies of the father of the defendants and their own. And neither the defendants aforesaid, nor their successors, have or shall have any right, title, claim in, or litigation for, the property, articles, dwelling-houses, dues, or orchards, &c., appertaining to the town of Futtoohabad, &c., Zillah Cawnpore, the possessions and occupancies of myself, of my brother, and of my uncles. The costs of the Court are agreed to be at the responsibility of the defendants." On the same day he executed the other instrument, called an *ikrar-nama*, and there he stated :—"Whereas I entered an action as a pauper in the Patna Provincial Court for the division of and entry into the property and estates belonging to the house at the town of Shahabad, *alias* Sahebgunge, Zillah Behar, against Muddun Mohun Awasty and Sheo Churn Awasty, and after the death of Muddun Mohun Awasty, against Mussamut Neent Kooer, widow of the said deceased, the guardian of Chintamun Awasty and Balgovind, minor sons of the said deceased; now I, of my free will and consent, have taken rupees 2,000 as my eighth share in the dues and price of goods sold at the time the deceased Sungun Lal Awasty's business was carried on," and so on; "and the sum of rupees 1,000 has been fixed by the defendants as the share of the widow of my brother Sheo Ram Awasty deceased (who lives with me, and is without issue) out of the amount collected, account the dues, and price of the goods sold aforesaid; I therefore engage and give in writing that I will deliver in a *razee-nama* in my action, conformably to the above condition, to the Provincial Court, and will get a deed of *farigh-kutti* executed to the defendants by the widow of my brother Sheo Ram, deceased, within two months, and deliver the same to them; at which time I will receive the sum aforesaid; and until I shall have got the said *farigh-kutti* executed by the said Mussamut abovementioned, the rupees 1,000 in question shall remain in deposit with the said defendants."

Now, taking those two instruments (which were contemporaneous) together, they amount to a decided agreement for the settlement of this action. By that agreement rupees 2,000 were to be paid to the plaintiff in that case, and he signed a receipt upon it—"I have received rupees 2,000;" but the same instrument says, "I engage in writing that I will deliver in a *razee-nama*." Now two things seem to be understood by this instrument: one is a relinquishment of the claim made in the suit, and the other is an engagement to deliver in a *razee-nama*, and this was in consideration of rupees 2,000. The rupees 2,000 were forthcoming from that moment, but at the time that this *farigh-kutti* was executed, there was something else to be done, for both these instruments were instruments executed out of Court; they were not instruments to be delivered to the Kazi to put an end to the cause, and therefore it is stipulated that, in addition to the former instruments, the plaintiff shall give a *razee-nama* expressing his satisfaction on record. I believe I am correct in stating that, for I find in the Index which is given to us, that a *razee-nama* is stated to be "a deed given by a complainant or prosecutor acknowledging himself to be satisfied;" and while that was pending, which it was necessary to do in order to complete the business, it would not have been prudent to give the rupees 2,000, nor would it have been prudent to give security for the payment of the rupees 2,000. That which was done, and which was a natural course of proceeding was this: The rupees 2,000 were not to be paid over, because the *razee-nama* had not been delivered, but the plaintiff was not to be left without some security, and therefore he had delivered to him a sort of note or bond for the execution of these instruments, leaving the *razee-nama* to be delivered on the part of the plaintiff.

Upon this matters appear to have ended, and thus it remained down to this time, when the dispute arose, because, immediately after this, this being in April

it appears that before the month of August a dispute had arisen, and this was the matter in dispute, that the *razee-nama* had not been delivered, and that was made a subject of litigation. The plaintiff said that he was in no respect bound by this instrument, that it had been obtained by fraud, and he alleged some circumstances from which fraud was to be inferred. One of these circumstances was that it had not been properly sealed by the Kazi; there were several other things more particularly mentioned—one of them to which the greatest weight seems to have been attached is, that contemporary with these instruments of agreement, there had been another agreement entered into between these parties, that notwithstanding the statement of a specific sum of 2,000 rupees three times over mentioned in the *farigh-kutti* given by the plaintiff, and also in the *ikrar-nama*, it was not intended that he should be bound by the sum of 2,000 rupees, but it was intended, notwithstanding that, that there should be an account taken of what might be due to him upon the footing of his original claim, and this was alleged by him in the Court below as the reason why he should not be bound by the *ikrar-nama*.

Now I have endeavoured to attend to this matter with all the care I could, and to what has been stated by the learned Counsel, and I have looked through all the papers myself, and I cannot find the slightest trace of any evidence to show that there ever was any such an agreement. They cross-examined the witnesses who were examined for the plaintiff, and they wholly denied it; however, so much credit was obtained for this statement, that it produced a great deal of litigation, and the plaintiff even obtained a decision that this instrument was not to be considered sufficient to stop the proceedings. It appears to me that that decision certainly is of a very extraordinary nature. I should not have adverted to it at all, if the Counsel for the appellant had not done so, and with great propriety on their part, because they wish to avail themselves of everything they can. They say, "Here we have the judgment of Mr. Fleming in our favour upon his point; he did not consider at this time that this *farigh-kutti* was binding."

Now what are the reasons which he gives? He refers to the former proceedings and to the examination of the witnesses who had been examined, and then he says this:—"As the plaintiff adduces a variety of objections to the *farigh-kutti* above-mentioned, which have been entered at length in the proceeding of the 4th of August 1819." The plaintiff adduces—there is not a word about this having been proved—"and as, exclusive of that consideration," that is, the consideration of the plaintiff adducing them, "the plaintiff has not taken the amount stated in the *farigh-kutti* aforesaid," not in the least stating the reason why he did not take it, or considering whether it might or might not have been his own fault that he had not got it, "nor delivered in a *razee-nama* and *sufinama* in the usual form;" he had not done that which he had not covenanted to do, "the decision of this suit on a *farigh-kutti* of that nature not carried into execution is deemed exceptionable." It amounts to this, because the plaintiff does not like it, therefore he shall not be bound to do it—he has entered into an engagement which he does not like to perform, and therefore he is not bound to perform it. I cannot see that there is much weight to be attached to a decision founded upon such reasons as those.

However, the matter went forward in consequence of this decision, and there were proceedings afterwards before Mr. John Sandford, in which the plaintiff's claim was dismissed, and he was ordered to pay the whole costs of the suit. Then afterwards there were other proceedings before Mr. Courtney Smith, who seemed to form a more favorable opinion of the validity of the instrument for the reasons which have been presented here. And then it went before Mr. Harington, and then it came before Mr. Sealy; and it strikes me as a conclusive fact in this case that Mr. Harington, after having examined all the evidence in the case, thought that the defendant had not made out any case independent of the *farigh-kutti*. It is not for us to consider that, because we think the case is concluded by the *farigh-kutti*, without referring to the evidence of Bhoop Sing, which with great ingenuity

is shown to be erroneous ; but looking merely to the others, and considering the evidence, with the inferences which are necessarily to be drawn from it, though not distinctly expressed, it appears that, after the execution of the *farigh-kutti*, the next step to be taken ought to have been taken by the plaintiff—that he ought to have given in a *razeenama*, and upon giving in a *razeenama* in performance of his own contract, there is not the slightest suggestion that he might not have had his money from the first moment—it was there ready for him, there was an act to be done to entitle himself to it, and that act he never did, and he cannot avail himself of his own conduct to dispute the right of proceeding in this case. It therefore appeared to their Lordships, on consideration of this matter, that, so far as relates to the dismissal of this plaint, the decree was perfectly correct.

There arises a question as to the costs. The *farigh-kutti* contains the clause which has been so often referred to—"The costs of the Court are agreed to be at the responsibility of the defendant." If, therefore, the plaintiff had performed his duty according to his engagement in entering up a *razeenama*, and had then received the 2,000 rupees, he would have received those 2,000 rupees quite free from any charge of costs. The defendants would have had to pay the costs of the Court at least. I will not say whether they might have meant more than the costs of the Court. But does it follow that the defendants are to be responsible for all the costs which afterwards arose in consequence of the unsuccessful and apparently most unjust litigation in reference to his claim which the plaintiff instituted and carried on for the purpose of freeing himself from the obligation which he had entered into by this *farigh-kutti*? There seems to be no reason at all for that except this, that he was suing as a pauper, and therefore ought not to be subject to any costs. He was indeed suing as a pauper. But it cannot fail to strike us as subject to some question, looking to these proceedings, that he was allowed to sue *in formâ pauperis*. It appears by this *farigh-kutti* that he had some property. It appears further, that that property had been made subject to attachment, and actually laid hold of and seized; there was real property, and there was property in deposit, property which was attached after the decree was pronounced, which was to this effect:—"A conclusive order and decree is passed, that the *fysala* of the Patna Provincial Court, dated 26th April 1821, be modified in the following manner:—That the appellant's claim to the amount of 2,000 rupees admitted by the respondents be awarded; that the residue of the appellant's claim, which has not been proved, be dismissed and rejected; that costs proportionate to the 2,000 rupees aforesaid be payable by the respondents, and the remaining costs of the parties' account, the residue of the appellant's claim, be entered at the appellant's responsibility; that for the present, in consequence of the appellant's pauperism, out of the fees on the respondents' part which are deposited in the treasury of this Court, half be paid to the vakeels, and the other half on the respondents furnishing the receipt be re-paid to them; and that, in the event of the appellant's property being found, the whole of the costs be paid therefrom."

This is not a personal order for the payment of costs but the costs which the appellant was to pay are the costs which he has to pay out of his property, if his property is found: not any personal claim is made against him under this decree; and with respect to costs, the question arose about costs afterwards.

There was a petition presented in January 1826, in which there was an allegation to this effect:—"Although the appellant has declared himself a pauper, he is not a pauper in fact, and notwithstanding he possesses thousands of rupees, worth of property in dwelling-houses and houses, and has in deposit 4,000 rupees with Tara Chund and Uma Ram, he has perjured himself; accordingly, after the Provincial Court's decision, in conformity to a durkhast of the vakeels on our part, the dwelling-houses, houses, orchards, and ponds, the acquisitions and occupancies of the appellant, situated in the town of Futtoohabad," that is, the

plaintiff's residence, "Zillah Cawnpore, were attached through the Judge of the "said zillah, and are under attachment to this day."

Then they presented a subsequent petition, in which they state :—"That, as the "2,000 rupees deposited by the appellant in the house of Rahman Sahoo, mahajun, "situated in the town of Sahebgunge, Zillah Behar, is forthcoming, and the teep "thereof filed in the *misl* of the case and conformably to the *fysala* of this Court, "the said sum has been decreed to the appellant. Under this circumstance we are "hopeful that an order be passed for the balance of our fees to be paid us out of "the said sum in deposit." The plaintiff is proved there to have 2,000 rupees; and it is shown that he has other property, because there has been an attachment issued; and besides, there is an allegation of 4,000 rupees in deposit. The order which is made upon that is only material for the purpose of showing that in this case there was no attempt to make him personally liable to the payment of the costs, but only out of his property. The order is that the said Judge is to be careful to issue the decree of this Court, and obtain payment of the sum of 2,000 rupees entered in the teep aforesaid, and from Ram Pershad, mahajun. Moreover, conformably to the respondents' statement, if any other property belonging to the appellant in the town of Futtoohabad may have been attached or may now be obtained by the respondents pointing it out, the same be sold by public sale, and therefrom paying the respondent the sum of rupees 394-1-18-3, costs of this Court, and also the costs of the Provincial Court.

Now that sum of 394 rupees is the sum which appears at the bottom of page 97 as coming for costs after the defendant's former amount has been paid by the arrangement pursuant to the decree which is appealed from. Whether it was intended to include the 2,000 rupees, the property in question, amongst the property out of which the 394 rupees were to be paid, does not seem at all to be material for the result at which their Lordships think they ought to arrive in this case. The costs which are ordered to be paid after this litigation are costs to be paid out of the property; therefore we think there is no inconsistency in doing that in this particular case. Their Lordships, therefore, will report to Her Majesty that, in their opinion, this appeal must be dismissed.

There is one observation now arising upon which their Lordships are ready to hear any information which can be given to them by the Counsel. Leave was granted to appeal *in formâ pauperis*.

Lord Brougham.—By the order of the 9th of May 1827, page 161.

Lord Langdale.—It seems that the appellant being ordered to find security, he did find security to the amount of 5,000 rupees.

Lord Brougham.—"To the satisfaction of the Court."

Lord Langdale.—Yes. It does not appear that there has been any order in this country authorizing him to sue *in formâ pauperis*. The question is whether that makes any difference. If the learned Counsel desire to address themselves to the Court upon that subject, they are at liberty to do so.

Lord Brougham.—Particularly as regards the fees here. He is by the order of the Court below allowed to sue *in formâ pauperis*, assuming that order to stand, which the order of the 9th of May does, provided he has fulfilled all the conditions imposed upon him, he was permitted to appeal to England, and we want to hear this matter argued, or at least spoken to, whether or not there ought not to have been an order of this Court to enable him to appeal here *in formâ pauperis*. The order below was necessary to enable him to commence the proceedings preparatory to the appeal, such as the heavy expenses of obtaining the transcript; but the question is whether there ought not to have been also an order of this Court, because we are the Court in which he is appealing, and in which he is prosecuting his appeal now. In general, when there is an order in a case for a person to be entitled to sue *in formâ pauperis*, of course the order is made in the Court in which he sues. An order allowing a man to sue in the Court of Chancery, before

the Master of the Rolls; or before any Vice-Chancellor *in formâ pauperis*, would enable him to sue *in formâ pauperis*, upon appeal, motion, or petition, before the Lord Chancellor, because that is all one Court in fact, and is a rehearing in fact; it is not an appeal, properly speaking; but it would not enable him to appeal to the House of Lords; he must have a distinct order there. What do you say to that? It is clear that the respondents, if we give the costs of this appeal, which it is probable we shall, will be entitled to the costs out of the property secured by deposit; but first, ought there not to have been an order made here permitting the appellant to prosecute the appeal here *in formâ pauperis*, whereas you have only an order below? You may consider this, and speak to it another day. It is a case which has not hitherto occurred, and we must enquire into the practice.

Mr. Moore.—Will your Lordships give us till to-morrow?

Lord Brougham.—Any day, to-morrow or Saturday. Saturday, we will say, but we want to avoid giving the parties the expense of another attendance if you are ready now. It is very hard that we should put them to the expense, for it is ourselves who want the information.

Lord Brougham.—Do you recollect whether we have ever had any cases of the kind before this Court?

Mr. Jackson.—I think so. I think there have been cases before.

Mr. Moore.—Your Lordships have had cases here where you have allowed the parties to sue *in formâ pauperis*.

Lord Brougham.—I am quite aware of that. The question is whether it would be necessary that we should allow them to do so; and, if that excuses them, notwithstanding the clear liability of the party to costs, from the responsibility of paying such costs if we decree them, whether it also saves them from the fees. Dr. Lushington's impression is that in the Consistorial Courts leave to sue *in formâ pauperis* enures as to the Court of Appeal; for instance, as to the Court of Delegates, and consequently to this Court, which perhaps is in the shoes of the Court of Delegates.

Mr. Moore.—There is a case from Jersey, I think, my Lord.

Lord Brougham.—It is possible that, consistently with Dr. Lushington's impression, the party may not have been a pauper in the Court below, but may have become a pauper subsequently.

Dr. Lushington.—That I have known certainly to occur.

Lord Brougham.—That would reconcile Mr. Moore's recollection and yours, probably.

Dr. Lushington.—My impression is that there have been several cases come up in which a party has been admitted to sue as a pauper in the Court below, and has continued to do so without anything being said or done.

Mr. Buller.—I think I shall be able to find some cases of that kind.

Mr. Jackson.—In Mr. Macqueen's Practice of the House of Lords, he says that the parties having been allowed to proceed *in formâ pauperis* in the Court below is a circumstance which would weigh in favor of his claim so to proceed in the Court below.

Lord Brougham.—I am perfectly certain that, in the House of Lords, he sues *in formâ pauperis* upon petition; but his having been allowed to sue *in formâ pauperis* in the Court below would be a strong argument in favor of the Court still allowing him to do so; but that shows that it is discretionary.

Mr. Jackson.—Exactly so.

Lord Brougham.—There is no doubt about the House of Lords; but Dr. Lushington's recollection would appear to be inconsistent with such orders being made here, unless it be explained and reconciled by the consideration I threw out that he might have been no pauper in the Court below, and might have become a pauper here, which would require an order; but Dr. Lushington may be quite correct in his recollection of the general practice.

Mr. Buller.—This case, your Lordships will recollect, comes on under an order of your Lordships, under an order in Council under the Act.

Lord Brougham.—I am aware of that. We do not think that varies it : we do not like to put the parties to expense ; but the first day after to-morrow—we shall search for precedents in the meantime, and the first day after to-morrow, Mr. Moore is always here on the other side ; and if either you or Mr. Jackson happen to be here again, we will speak to you on the matter. It is to be understood that the parties are not to be put to expense. It would be a hard thing upon the parties. It is for our own information.

Mr. Buller.—It will not be in the paper.

Lord Brougham.—No, we shall take it when we see you are ready.

NOTE.—The subject of costs was on the following day again mentioned. Their Lordships then reported to Her Majesty their opinion that the appeal should be dismissed with costs ; and the usual order in Council to that effect was subsequently issued dated 19th December 1846.

The 19th February 1847.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Hindoo Law—Will—Vested interest—Division—Widow—Undivided property.

On Appeal from the Sudder Dewanny Adawlut for the N. W. Provinces.

Rewun Persad,

versus

Mussamut Radha Beeby.

A Hindoo testator, after the death of his widow, gave a moiety of his property to his brother *A*, and on his death to *A*'s two sons *B* and *C*. *A* died in the life-time of the testator's widow, and a complete division of all *A*'s property which was held in co-parcenary was agreed upon between *B* and *C*. *B* also died in the life-time of the testator's widow, and on the death of the testator's widow, *B*'s widow claimed his share.

Held that *B* and *C* took *A*'s moiety under the will as tenants in common, and that each of them had a vested interest in a one-fourth share though the actual enjoyment was postponed until the death of the widow ; and that the claim of *B*'s widow was not barred by the doctrine of Hindoo Law that a widow succeeding as heir to her husband cannot recover property not in the possession of her husband, which doctrine was held to be inapplicable to the case of property in which the husband had a vested interest under a will or deed though the actual enjoyment thereof was postponed during the life-time of another.

According to the Hindoo Law, a widow cannot claim an undivided property.

Judge of the Admiralty Court.—FOR the purpose of shewing distinctly what are the questions of law and matters of fact in dispute in this appeal, it will be expedient to state, in the first instance, the circumstances respecting which there is no dispute.

Fakir Chund died in the year 1814, and for the present we will call him the testator in this cause. He, in March 1814, executed an instrument intended to regulate the disposition of his property after his death. That instrument is set out at length at page 44 of the Appendix.

Fakir Chund, the testator, was one of three brothers ; his elder brother was Bhowany Persad, who is stated to have divided from his family, which was originally an undivided Hindoo family ; he left two sons, Dial Das and Goonee Lal. The date of the death of Bhowany Persad is not stated, but it was before the month of March 1814. Beekhary Das was the youngest brother, and he died in 1817 ; he had three sons, the eldest, Koonj Behary, died in 1825, leaving a widow, Radha Beeby, the respondent in this appeal, but no male issue ; Mudun Mohun, the second son, died in 1829, and he left a son, Rewun Persad, who is the present appellant ; the third son died young, and there is no interest derived through him concerned in this litigation.

The property in dispute was the property of Fakir Chund, and all the parties agree that the instrument which he executed in March 1814, in triplicate, is a valid and operative instrument, and to be carried into effect. To that instrument were appended the signatures of his brother, Beekhary Das, and his nephews, Dial Das and Goonee Lal, the sons of the elder brother, Bhowany Persad, and the signatures of his nephews, Koonj Behary and Mudun Mohun, the sons of Beekhary Das.

Pursuant to the terms of that instrument, on the death of Fakir Chund, in 1814, his widow, Mehtaboo, succeeded to the possession and enjoyment of his property. She died in 1833, and then a litigation arose as to who were entitled, and in what shares, to take the property of the testator, subject to certain bequests in the instrument before mentioned.

It is not necessary to state the details of this litigation. In the result, Dial Das took, under the decree of the Court, one moiety, and Rewun Persad was put into possession of the other moiety, but not so as to preclude any claim which Radha Beeby, the widow of Koonj Behary, might have to a share thereof.

Accordingly, she commenced a suit to recover a fourth share of the estate left by Fakir Chund, and for that purpose filed her plaint on the 1st of June 1835, in the Zillah Court of Mirzapore. Dial Das compromised with the plaintiff, the present respondent, and Rewun Persad in effect became the only defendant, and is now the appellant. In short, the only question now to be determined is, whether the respondent, the widow Radha Beeby, as heir to her husband Koonj Behary, is entitled to recover from the appellant, Rewun Persad, one-half of the moiety of the estate of Fakir Chund, which Rewun Persad is now in possession of.

After various proceedings, which it does not appear necessary to discuss, on the 29th of November 1837, the Judge of the Zillah Court, Mr. Thomas, pronounced a decree against the plaintiff, the present respondent. From this decree the then plaintiff and now respondent appealed to the Court of Sudder Dewanny Adawlut at Allahabad, and on the 14th of March 1838, the Judges of that Court, Mr. Turnbull and Mr. Monckton, reversed the decree of the Zillah Judge, and remitted the case back to be re-tried, being of opinion that the questions to be decided had not been properly investigated.

Accordingly, the Zillah Court again entered upon the consideration of the case, and, amongst other things directed to be done by the decree of the Sudder Adawlut, obtained the bewusta of the pundit of the Zillah Court of Allahabad. The decree was pronounced by the Sudder Ameen, a native Judge, on the 14th September 1838, and he dismissed the suit of the defendant, the present respondent, with costs.

An appeal against the decree was presented to the Court of the Sudder Adawlut at Allahabad, and both agreed upon a joint case to be submitted for the bewusta of the Pundit of the Sudder Court, each party stating the facts upon which they differed separately. By order of the Court, the opinion of the Pundit of the Sudder Adawlut Court at Calcutta was subsequently obtained.

Mr. Monckton, one of the Judges of the Appellate Court, on the 8th of April 1839, pronounced his opinion in favour of the respondent, and that the decree of the Zillah Court ought to be reversed. The papers in the cause having been submitted to the consideration of Mr. Taylor, another Judge in the same Court, his opinion agreed with that of Mr. Monckton, and accordingly, on the 29th April 1839, a decree was pronounced reversing the decree of the Zillah Court dated the 14th of September 1838, in effect declaring that the respondent was entitled to recover one-fourth of the estate left by Fakir Chund; that the present appellant should pay to her as much as he had received beyond a fourth share of the said estate, and that Dial Das should, if there was any deficiency, make good the same.

From this decree Rewun Persad has appealed to her Majesty in Council, and the question is whether he ought, according to the law prevailing as to Hindoo families in the district where the parties lived, to refund to the respondent so much of the estate of Fakir Chund as exceeds one-fourth thereof.

There are certain facts not in contest in this cause. All parties agree that the will or deed of Fakir Chund, whichever it may be called, is an operative instrument; that one moiety of his estate, on the death of his widow Mehtaboo, became the property of the family of Bhowany Persad, and that one-fourth of the property belongs to the appellant, Rewun Persad, through his father, Mudun Mohun, who died before Mehtaboo, *viz.*, in 1829. Neither is it denied that the remaining fourth became part of the estate of Koonj Behary, who died in 1825, in the same manner as the one-fourth became part of the property of Mudun Mohun, assuming it to have vested in either during their lives.

Again, it is admitted that, according to the Hindoo Law of Succession, Radha Beeby, the respondent, became heir to the divided estate of Koonj Behary, he having died without male issue.

Radha Beeby, the respondent, being entitled to the estate generally of Koonj Behary, she is entitled to this one-fourth of the property of Fakir Chund, if it is become a part of the estate of Koonj Behary, unless by Hindoo Law there is some exception arising either from particular facts creating it or from the nature of the property.

The appellant alleges, and alleges truly, that the respondent cannot recover from him the property of which he is in possession unless she proves her title. She asserts that she as heir is entitled to the whole, unless there be a special exception. The appellant alleges two grounds of exception:

First.—That Koonj Behary and Mudun Mohun were two undivided brothers, and that this share of Fakir Chund's estate was undivided; that, by the Hindoo law, therefore, the widow cannot claim it, though she be heir.

Secondly.—The appellant alleges that this property never was in possession of Koonj Behary; that, by the Hindoo Law, the widow, though his heir, cannot claim property not in possession of the deceased husband, and that, for this reason, her claim must fail.

Now, as to the first grounds of defence, the law is not disputed. It is not denied that a widow cannot claim an undivided property. The decision of this question therefore turns upon a matter of fact, namely, whether Koonj Behary and Mudun Mohun were divided brothers or not.

We think that it may be admitted that the *prima facie* presumption, where there are no circumstances to affect it, is that every Hindoo family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of this case lead us to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindoo Law which may have a bearing on the conclusion to be drawn from the facts.

First.—We apprehend it to be undisputed that a division may be effected without instrument in writing. *Secondly.*—That a division may be either total or partial. *Thirdly.*—That a separation from commensality does not, as a necessary consequence, effect a division of property, or, at least, of the whole undivided property.

The respondent alleged in her plaint, Appendix, page 4, that in the years 1818, 1819, and 1820, a separation took place between Koonj Behary and Mudun Mohun, when the one-half share of the estate of Beekhary Das was equally divided between them; that they came to a mutual settlement, and separating, each established a distinct concern for himself.

Beekhary Das died in 1817, and, by the instrument of March 1814, called the will of Fakir Chund, a moiety of his property, on the death of his widow, is given in these words:—"Let my brother, Beekhary Das, aforesaid, and, after the death of my said brother his sons, take one-half."

Now, we conceive that Beekhary Das, having died in 1817, in the life-time of the widow, the tenant for life and his sons surviving him, this moiety was not a

part of his estate, properly speaking, and that, therefore, *prima facie*, it could not be divided as part of the estate of Beekhary Das.

But, perhaps, as these pleadings are not expressed with much accuracy, it may be that, by the one-half share of the estate of Beekary Das, was meant the moiety of the estate of Fakir Chund, which would have come to him had he survived Mehtaboo, the tenant for life.

Now, assuming this to have been intended to have been expressed by the plaint, still such half share could not *de facto* have been divided between them, for the widow had still the enjoyment of the whole. But the plaint may perhaps mean to aver that there was an agreement between the two brothers, that the one-half share of Fakir Chund's property, which would have devolved on Beekhary Das had he survived Mehtaboo, should be divided, as far as was then possible *de facto*; and in support of this understanding of the purport of the agreement, the entries said to have been made in the books of various concerns might be evidence, provided they had reference to the property of Fakir Chund.

Before, however, prosecuting this enquiry further, it may be expedient to examine what has been done in the Court below, and to ascertain, as far as we can, on which side the weight of authority preponderates. So far as the decision of this case may be affected by the weight of authority in the Courts of India, it stands thus:—In the Zillah Court of Allahabad the Pundit of that Court was consulted, and his opinion will be found at page 63; that opinion, shortly put, is to the following effect: that, if there has been a separation between two brothers, the widow of one, becoming his heir, may cause the separation of any portion of the estate which may remain *de facto* undivided; that this doctrine does not apply when the estate of the husband's father only had been divided, to the estate of the uncle of her husband, such estate not having come into her husband's possession before his death.

It is difficult to deal with such an opinion as this with reference to the question we have to solve. If the property now sued for was a part of the estate of Koonj Behary at the time of his death, then, according to the first part of the opinion of this Pundit, the widow's claim would be valid; but if it formed no part of the estate of Koonj Behary, and if the division was confined to the estate of the husband's father, then the widow would not be entitled, because the property never was in the husband's possession. We think that the opinion of this Pundit renders very little assistance to the solution of the difficulties arising in this case. For, *first*, this Pundit is silent as to whether this property ever was part of the estate of Koonj Behary or not; *secondly*, he assumes that the only property divided was that which came from Koonj Behary's father; and, *thirdly*, he omits all mention of the will or deed of 1814.

The judgment of the Principal Sudder Ameen (pages 68 and 69) throws no further light upon the matter, for he merely recites the bewusta, and rejects the widow's claim, without attempting to shew how the bewusta applied to it.

The opinion of the Pundit of the Sudder Adawlut of Allahabad was taken on a case submitted by both parties. It will be found at page 80. His answer is partly in favour of the widow's claim. He considers that Mudun Mohun had no claim to the disputed property at all, because it never came into possession until after the two brothers had separated, and was never held in co-parcenary by them, and that therefore Rewun Persad, as the son of Mudun Mohun, has no claim at all to it. He considers the disputed property as undivided property, but if a part of the estate of Fakir Chund, that neither of the present parties could claim by inheritance, but that both are entitled under the will or deed. He affirms that the heirs of Mudun Mohun and Koonj Behary derive their only title from the deed.

The answer, however, to the third question at page 80 would seem to place the right of the widow entirely on the question whether a division of the paternal

property of Beekhary Das had taken place before the death of Koonj Behary and Mudun Mohun.

It is not easy to reconcile these two opinions.

The Pundit of the Sudder Adawlut of Calcutta gave in his bewusta, which will be found at page 81.

The opinion of this Pundit supports the claim of the widow, whether there had or had not been a division of Beekhary Das's estate between his two sons.

Upon a careful consideration of this opinion, and the authorities cited in support of it, the grounds of it would seem to be that the widow is the heir of Koonj Behary, and that she is in such character entitled to all his property which was not held in co-parcenary with his brother; that the disputed property passed by the deed of 1814, which was signed both by Koonj Behary and Mudun Mohun, to them in moieties on the death of their father; that by force of the deed it was divided into moieties and taken by them or their heirs; no separate and divided property coming by gift from Fakir Chund.

The decision of Mr. Monckton, the Judge of the Sudder Adawlut of Allahabad, before whom the cause first came, is in favor of the widow (page 86).

He appears to be of opinion that the disputed property was in every point of view divided property. That a complete division took place between the two brothers; and that, had Mehtaboo died in their life-time, this property would have been divided between them *agreeably to the deed*, and that Koonj Behary's share would have descended to the widow as his heir, and must consequently do so now. In this opinion Mr. Taylor, another Judge of the same Court, concurred.

The true question, then, before us, is whether we are convinced by the arguments of the appellant that this decision is erroneous; for if not so convinced, it must be affirmed.

We find it impossible to reconcile the whole of the reasonings of the Pundits and of the Court together, and to render them entirely consistent. The conclusions in the main agree, but the reasons assigned do not do so altogether.

We think, on a consideration of all the circumstances, that a complete division of all the property of Beekhary Das which was held in co-parcenary was agreed upon between the brothers, and we think so from a consideration of all these papers.

First.—Such division is very distinctly alleged in the plaint at page 4. In the petition of Rewun Pershad, at page 7, which is an answer to the plaint, a separation from commensality is admitted, though a division as to the property is denied.

In the supplementary plaint, at page 20, the division is again pleaded, with this addition, that what could not be immediately realized, remained in co-parcenary till a realization could take place as loans and debts due to the joint concerns, and the property coming under the deed of Mehtaboo during her life.

The answer of Rewun Pershad, at page 23, admits a division, but denies it to be complete, not stating, however, what were the limitations, and then seeks to avoid the effect of a division by alleging that no division could affect the property during the life-time of Mehtaboo, it being during that time in joint partnership.

The respondent, at pages 23, 24, re-asserts the division, and alleges that the disputed property stood on the same footing as the balances due on accounts in joint partnership, to be divided as they accrued.

The rejoinder, at page 25, raises this distinction that the division of the outstanding debts was subject to no contingency, Beekhary Das being dead, but that the disputed property was subject to the life estate of Mehtaboo.

So stands the case upon the pleadings. A division is admitted, and no particular exception alleged. The objection of Rewun Pershad is not that there was a special exception of the disputed property, but that from the nature of the property, it was necessarily excepted.

We do not think that there is anything in the nature of the disputed property which should except it from a general division. It is not contended that there are any peculiar rules of construction in India applicable to the instrument called a will or deed. The testator, after the death of his widow, gives his property to his brother, Beekhary Dass. On his death it becomes divisible into two parts, one moiety to the sons of Beekhary Dass. We apprehend that they would take as tenants in common—in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow. But here was no contingency, as contended for by the appellant. The only uncertainty was the period of enjoyment.

If, however, the will could be construed so as to read the bequest to the brothers as a joint tenancy, even in that case we do not see any cogent reason why they should not agree to divide the property in severalty when the period of enjoyment occurred.

We are inclined, indeed, to the opinion that this property was not properly the subject of any division at all, but that the division was affected by the deed or will, and that each brother took one-fourth as a divided property.

But to look to the evidence in the Zillah Court as to a division. It is not of a definite kind, nor are we quite certain how far the Court below made use of it. At page 27 will be found the deposition of the vakeel of the widow. He declares that he has a chitta written by Mudun Mohun to Koonj Behary, undertaking to produce the deed of Fakir Chund, and a deed of sale whereon is endorsed a sale by Mudun Mohun of this share to Koonj Behary.

Now, supposing those documents produced, the utmost effect which could be given to them is that Mudun Mohun, through whom Rewun Pershad claims, acknowledged some interest in the deed or will of Fakir Chund to belong to Koonj Behary; and as to the sale of the part share of the house, that possibly it may be inferred from it that it was a part execution of an agreed division.

Some documentary evidence was produced at page 28; proceedings in suits between other persons to shew the law. Those, we think, do not require comment; they are produced only for the purpose of introducing the bewustas of Pundits on what are assumed to be similar questions of Hindoo Law; in fact, they are not similar in many essential particulars.

The same observation applies to the bewusta produced on behalf of the appellant, Rewun Pershad, at page 40. The law, as laid down, may be true, but it does not govern this case, nor do the proceedings in the other suits apply to this case.

In the Sudder Adawlut, however, much more important evidence was produced, *viz.*, the proceedings in an action brought by Mudun Mohun in 1825. In that suit Mudun Mohun pleaded the division of the paternal estate, and the separation from his brother, Koonj Behary.

We think that this averment by Mudun Mohun, and which was supported by evidence, is strong proof against Rewun Pershad, who claims through him, that a division and separation had taken place; and further that it was a complete and entire division, for no limitation is alleged.

And herein we agree with Mr. Monckton, that the fact of Rewun Pershad not having specified any exceptions to the partition being of the whole of the paternal property, is evidence that there were no exceptions.

We think that, upon a consideration of these premises, we are justified in concluding, if such conclusion be necessary for the decision of this case, that a complete division and separation did take place between Koonj Behary and Mudun Mohun.

It may be well here to notice another argument which was strongly pressed on behalf of the appellant. It was said that the widow, as heir, could not claim any property of her husband which was not in possession at the time of his death; that the disputed property was, at that period and for years afterwards, in the possession of Mehtaboo, and that, consequently, Radha Beeby can have no claim to it.

The first observation which strikes us as to this argument is that it was never distinctly urged in the Courts below, though it is true that the Pundit of the Zillah Court of Allahabad makes it the principal foundation of his opinion (page 63).

There is not the least reference to it in the opinion of the Pundit of the Sudder Adawlut of Allahabad, nor in that of the Pundit of the Sudder Adawlut of Calcutta, nor in the judgment of Mr. Monckton, in which Mr. Taylor concurred. We think that it would be impossible, under such circumstances, for us to reverse the decree of the Court below on that ground. Indeed, this averment of the law is not even one of the grounds of appeal.

We have no intention whatever to disturb the doctrine of Hindoo Law that a widow succeeding as heir to her husband, cannot recover property not in possession of her husband. But we think that it has not been shewn in this case that the disputed property was not in possession according to the meaning of that term in Hindoo Law, nor that the doctrine applies to a property where the husband had a vested interest under a will or deed, and the actual enjoyment thereof was postponed during the life-time of another.

We proceed then to determine this case, on the assumption that there was a complete division between the two brothers, and that the law, as to possession by the husband, does not, under the existing circumstances, bar the widow's claim.

Now, if this be so, we think that the judgment of the Court below must be affirmed in every view of the case. It is admitted on all hands that Radha Beeby is the heir of Koonj Behary, and that she is entitled, as such, to all the property which was not held in co-parcenary with Mudun Mohun. The disputed property was derived from Fakir Chund, and whatever rights Beekhary Dass had in it are founded upon his deed or will. The same observation applies to any rights which belonged to Koonj Behary and Mudun Mohun. If the disputed property be deemed to be property given or bequeathed to Koonj Behary and Mudun Mohun by the deed or will, then we think that it was divided property and never held by them in co-parcenary, and in that view the widow is entitled as the heir to the divided property of Koonj Behary.

If the property be considered as the property of Beekhary Dass (a supposition very difficult to be made) then we think that if, on his death, it was held in coparcenary by the two brothers, it was divided and became separate by the division made between the two brothers.

We do not think that this property was bequeathed to the two brothers as joint tenants. But even if it were, we should incline to the opinion that the division extended to it. We therefore come to the conclusion that, either the disputed property was never held in joint tenancy, or that if so held, it was divided, and consequently we affirm the judgment, on the grounds taken by the Pundits in the Sudder Adawlut, and adopted by the two Judges of that Court, and it must be affirmed with costs.

The 30th June 1847.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir A. Johnston,
and Sir E. Ryan.

Hindoo Law—Succession.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Rany Pudmavati,

versus

Baboo Doolar Sing and others.

The question being whether the succession in this case was regulated by the Bengal or Mitihila Law,—
Held, in accordance with the Court below, after an examination of the whole evidence, that the Mithila Law was applicable.

The Chancellor of the Duchy of Cornwall (T. P. Leigh).—IT appears to their Lordships in this case, that the mode in which the respondents have stated their case at the bar, makes it quite unnecessary to enter into any consideration of the several questions which were opened to the Court on the part of the appellant. The respondents now rest their claim to this estate entirely as the heirs of Rung Lal Sing. They say that Rung Lal Sing died intestate, and that they, the respondents, are his heirs. They brought forward that claim immediately upon the death of Rung Lal Sing, that is, they claimed the property immediately upon the death of Rung Lal Sing; and all question therefore upon the Statute of Limitations appears to us to be out of the case, so far as applies to the title they set up as heirs of Rung Lal Sing.

So again all question as to the property being ancestral or not ancestral, and as to the family being divided or undivided, must be put out of consideration. The only two questions appear to us to be : *first*, did Rung Lal Sing die intestate ? and, *secondly*, if he died intestate, are the respondents his heirs ?

With respect to the first question, when the case was originally opened to us, the factum of the will appeared to have been proved in the cause, and not to have been disputed by any cross-examination of those witnesses who appeared on the part of the appellant, or otherwise. Under these circumstances it did appear to us to be somewhat singular that, merely upon a general presumption of fraud, the question as to the validity of the will should have been decided against them; but it turns out now that no proper evidence was ever given in the suit, upon the fact of that will being or not being genuine. On the death of Rung Lal Sing certain depositions were taken, not however in this suit, but long before the institution of this suit; and it appears that they were taken for an entirely distinct purpose, namely, in one case, for the purpose of the proceedings going on in the Civil Court, and in the other case, for the purpose of the proceeding before the Collector. The object of the proceeding in the Civil Court was to substitute the name of the appellant for the name of Rung Lal Sing in all proceedings with respect to the zemindary in the Civil Court.

The object of the proceeding before the Collector was to have the name of the appellant registered instead of the name of Rung Lal Sing, as proprietor of the zemindary. Now it seems that the Collector acted upon the will, and that then the Civil Court acted upon the decision of the Collector. The decision of the Collector, of course, was not a proceeding, in any Court of Justice at all; it was not a judicial proceeding, and by the Regulation VIII of 1800, it is expressly provided that the entry of the Collector shall not in any decree "affect the rights of any party whose name may be registered therein as the ostensible proprietor of the land, or whose name may not have been registered as the proprietor, but who may establish a right of property in the Dewanny Adawlut, or otherwise." I do not think it very distinctly appears whether the respondents had or had not an opportunity of cross-examining the witnesses.

It does not appear that they had, I think; but they themselves presented a petition alleging that this will was a fabrication, and praying that certain witnesses, whose names they mentioned, might be examined to prove the fact of that fabrication. What was done upon this, I think, does not distinctly appear; but at all events it was a distinct notice to the appellants, that the respondents alleged that will to be a forgery.

When the suit was brought, the intestacy was alleged, and in this state of things certainly it was incumbent upon the appellant, if she relied upon that which was thus disputed, to produce clear and conclusive evidence in favor of that instrument. But in fact she produced no evidence whatever, that is to say no evidence which a Court of Justice could in this country receive, nor any evidence which could have much weight, I think, in any Court of Justice whatever. It was, however, received below, and therefore I do not apprehend that

we can treat it as not being evidence in the cause. But still it is evidence of such a character, that it appears to us impossible for any Court to rely upon it.

Now the Sudder Court were of opinion that the will must be disregarded, and on the 9th of May 1833, they pronounced an order, in which, after stating "that the will produced by the respondents is not correct or credible, and by the legal opinion of the Hindoo Law officer of this Court, it appears that the estate of Rung Lal Sing descends to the plaintiffs (appellants) by the Hindoo Law current in the country of Mithila, and that Pudmavati is entitled to the expenses of her support and religious ceremonies according to the usage of the family," the Court directed certain enquiries with respect to that law.

It is said that that order, which was made on the 9th of May 1833, was founded upon the assumption of the invalidity of that will, and that that order not having been appealed from, the question on the validity of the will is not now open. Now it does not appear to us to be necessary to decide that point, because we are clearly of opinion that there was no evidence before the Court upon which they could properly have acted to affirm the validity of that will.

Then the fact of the will being out of the case, of course it becomes unnecessary to consider whether, by the Mithila Law, there was a power of devising or not; and therefore the very able argument addressed to the Court on behalf of the appellant, it is not necessary for us to deal with.

The whole question therefore is, does the Mithila Law prevail in this family to govern the descent of its property; and if it does, are the respondents by law the heir? Now the pedigree is not disputed, and we have the opinion of all the law officers, that, according to that pedigree, the respondents are, by the Mithila Law, the heirs in this case; and there is nothing appearing in the cause against that.

Now, how does the Mithila Law govern this case? Upon this point there appears to have been a most careful enquiry in the Court below.

The decree of the Moorshedabad Court assumed that the Bengal Law prevailed, and upon this the respondent appealed to the Sudder Court, which, upon hearing the cause, decided that the Mithila Law prevailed. Now this fact that the Mithila law was to prevail, does not at that time appear to have been disputed, for at page 164 we find the matter thus stated by the Judge, Mr. Walpole:—

"It appears by the papers that the real claim of the plaintiffs is for the estate of Rung Lal Ling, and that the estate of Ghureeb Das and others is stated only to trace the connection of the ancestors. The allegation of the appellants, that the Mithila Law is followed in their family, appears to be correct, and is not denied by the respondents. It is therefore necessary in this case to ascertain which of the two and the third parties is entitled to the estate of Rung Lal Sing, who died unmarried and without issue, by the Mithila Law." On the 26th December 1833, that decree was made, directing the enquiry as to who, according to the Mithila Law, was entitled to succeed, which law was to prevail; and on the 3rd of April 1833, an opinion in favor of the respondents was given, which is stated at pages 164 and 165.

Upon this the appellant presented a petition, alleging that the Mithila law did not prevail in her family; and that was, as far as I understand it, the first occasion on which that representation was made.

Thereupon, on the 9th of May 1833, by the decree which is stated in page 64, the Court of Sudder remitted the case to the Provincial Court, treating the will as invalid, and directing an enquiry into the fact of which law prevailed in this family. A vast deal of evidence was gone into, when the case came before the Poornea Court, which had succeeded the Moorshedabad Court, and they decided that the Bengal Law governed the possession.

Against this decree there was an appeal to the Sudder Court, and on the 15th of January 1838, the cause came before Mr. Harding, one of the Judges of that Court. What then took place is stated at page 195. It sets forth, that, "in con-

"sideration of the dispute and statements of both parties, and the nature of the case, it is necessary to ascertain, before the decision, what were the customs and rites of marriages and funerals deposed to by the witnesses of both parties; whether they were according to law, or not; the pleaders of both parties were therefore questioned, and they consented to refer the matter to the Hindoo Law officer of this Court. Ordered, therefore, that a copy of this proceeding be sent, with the depositions of the witnesses of both parties, to him, with an order to make a full report, in two weeks from the date of receiving it, after giving full consideration to the depositions, whether the marriage and funeral customs and rites of the Mithila Law stated by the witnesses of the plaintiffs to be observed in the family of both parties, can be understood also of the Nuddea Law; and whether similarly the customs and rites stated by the witnesses of the defendant to be according to the Nuddea Law, can be understood of the Mithila Law."

On the 17th of May 1838, the officer made his report in favour of the respondents, which is stated in page 228. The appellant was dissatisfied with this report, which was merely a short statement of the officer's opinion being in favor of the respondent, without going into particulars; and on the 26th of June 1838, the case came before Mr. Halhed, another Judge, and he directed further questions to be prepared, in order further to elucidate this matter.

A further opinion was then given by the Hindoo Law officers, and that opinion also was in favor of the respondents.

Upon this the Judge of the Sudder Court, before whom the case originally came, was of opinion against the opinion of the Court below, and it became necessary, as I understand the practice is, to go to a second Judge of the Sudder Court; and accordingly it did go to a second Judge. And then it appears that he made a still further enquiry upon this subject, after having called the pleaders of both parties (who appear in this case both to have been Europeans), and he settled the question, it appears, in their presence, and it says, "After which the pleaders and agents of both parties said that they had nothing further to represent." And they must therefore be taken to have both agreed upon those questions.

The questions in this case were originally prepared for the opinions of the Hindoo Law officers, and it seems to have been considered, justly perhaps, that after all that had passed, the Hindoo Law officers having given their opinions several times, it would be proper to take the opinion of the officer of the Tirhoot Court, where this law prevailed.

Those questions were prepared, and the officer of the Court of Tirhoot gave his answers upon all those questions, and it then came again before the Judge who had sent those questions for his information upon the subject.

Now, those questions were framed with a view of enabling the Court to judge, by the answers to the particular questions put by him, whether, according to the evidence which was before him of what appeared to have been the ceremonies used in this family, the Mithila Law or the Bengal Law prevailed; and he was clearly of opinion that the Mithila Law prevailed, and confirmed the opinion of the first Judge, and the decision was finally pronounced.

Now, it is admitted that it is utterly impossible for any European Court to weigh very nicely the effect of evidence of this kind as to particular ceremonies, and the weight which is to be due to those particular ceremonies as establishing the fact of one law prevailing or the other; and therefore the learned Counsel at the bar have very naturally and very properly abstained from going into any minute examination of the evidence upon this point. The question, therefore for us is:—Is there evidence stated before us which shows that the opinion which was come to, after repeated investigation and after taking the opinions of the various law officers of the Courts, all of them concurring in the same conclusion, is an opinion by which we should be guided?

Now, certainly, so far from there being anything in the facts before us which is inconsistent with this, the most important fact appears to us to be consistent with it, and only consistent with it.

On the death of Sobhe Sing, Pohput Sing and Rung Lal Sing, being his sons, became joint proprietors, and entered into possession of this estate. Pohput Sing, died, leaving a widow, and, according to the Bengal Law, as I understand it, the widow of Pohput Sing would have been entitled, under those circumstances, to succeed to the share of Pohput Sing, her deceased husband, for her life. And accordingly certainly, it was understood, from the original statement of the case, that, upon the death of Pohput Sing, she did so succeed to her husband's share, and that she came into possession of the other half of the estate upon the death of Rung Lal Sing.

But the evidence, upon examination, turns out to be quite the reverse ; for it is clear that Rung Lal Sing, upon the death of Pohput Sing, presented a petition, stating his title as a title to the whole estate, and that he was let into possession of it, and that she was entitled to maintenance out of it, according to the Mithila Law, and that that maintenance was preserved to her.

Again, upon the death of Rung Lal Sing, the appellant herself presented a petition, and she claimed, as successor under the will, the whole of the property of Rung Lal Sing. It seems, therefore, clear that, upon the death of Pohput Sing and upon the death of Rung Lal Sing, the succession was regulated by the Mithila Law, and not by the Bengal Law. That was entirely in accordance with the result, to which, after an examination of the whole of the evidence, the Court below has come ; and we are of opinion that that decree is perfectly right, and therefore that it must be affirmed, and affirmed with costs.

Lord Brougham.—It is impossible to praise too highly the great care which the Court below appear to have taken in obtaining the best possible information upon the subject—a somewhat nice and intricate subject—of the customs and ceremonies governing this case. There were three or four separate enquiries, giving the parties the fullest opportunity of suggesting questions and directing further enquiry when the reports were not sufficiently decisive ; and it was found that the parties were quite satisfied with the nature of the questions that were laid before the authorities. I never saw a case better sifted than the present, and it certainly affords the Court great confidence in coming to the decision which it has now pronounced.

Decree affirmed with costs.

The 16th December 1847.

Present :

Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh,
and Sir E. Ryan.

Hindoo Law—Succession.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Rany Srimuty Dibeah,

versus

Rany Koond Luta, Rany Rung Luta, and others.

The question being whether the descent in the family in this case was to be regulated by the Dyabhaga or the Mitakashara.—**HELD**, upon the evidence, that the Dyabhaga applied to the decision of the cause.

Lord Langdale.—THIS is an appeal from a decree of the Court of Sudder Dewanny Adawlut of Calcutta, dismissing the suit of Kundurp Sing deceased, for the recovery of a zemindary of four pergunnahs in the Zillah of Midnapore from ~~Mohun~~ Lal Khan, deceased.

The appeal is prosecuted by the widow and representative of Kundurp Sing' against the two widows and representatives of Mohun Lal Khan and others. The case is as follows :—

On the 1st of July 1800, the Rany Seeromany being the sole possessor of the zemindary in question as the surviving widow and heir of her deceased husband, Raja Ajeet Sing, who died in 1754, executed a deed purporting to be a deed of gift, of the zemindary to Anund Lal Khan.

The gift was opposed by Shamanund, Gujraj, Roop Churn, and Ram Churn, who claimed to be the heirs of Raja Ajeet Sing. They presented a durkhast in support of their opposition. But the durkhast was rejected, and the donation was registered and proclaimed.

The Rany was herself a party to this proceeding, and in her answer to the opposition, admitted the gift which she had made. But some time afterwards she complained of and disputed the deed, and in 1806 she commenced a proceeding of her own to recover possession of the zemindary from Anund Lal Khan. In this proceeding she was non-suited, but by leave of the Court she commenced a proceeding to set aside the gift, on two grounds: *First*, that it had been obtained from her by fraud; and, *secondly*, that it had been executed without the consent of the heirs of Raja Ajeet Sing, her husband, and of her guardians.

In the course of these proceedings it was held that the male heirs of the Raja Ajeet Sing were the guardians or protectors of the widow, but that the mother's brothers' sons of Raja Ajeet Sing were the heirs expectant or presumptive to the zemindary. And by the decree of the Sudder Dewanny Adawlut, dated the 31st of August 1812, on the appeal from the decree of the first Judge of the Calcutta Provincial Court, dated the 30th of March 1811, it was stated that it could not be ascertained whether the deed of gift was obtained from the Rany by deceit as she alleged; but that it appeared by a bewusta of a pundit of the Court, and the text of the sastras cited therein, also from the tenor of the 11th Chapter of Dayabhaga, which was the most reputable of all the pothees in use in Bengal which are observed in the families of the litigating parties, that, after the death of Raja Ajeet Sing, his relatives descended in the male line who were living and capable of taking care of the Rany, were Pirbhoo, that is, her guardians or protectors, and that without their advice and consent, she had not, according to the sastras, the power of making a gift to any one of the zemindary left by her husband. It was further stated, that although, agreeably to the sastras in use in Bengal, the persons who claimed to be male heirs of Raja Ajeet Singh, could not be considered his heirs when opposed to his mother's brothers' sons, and although Mohun Lal (claiming under Anund Lal, and then defendant) had produced deeds purporting to have been executed in his favor by some of the persons who represented mother's brothers' sons of Raja Ajeet Sing, yet there was not proof either of the permission of his relatives, descended in the male line, or of the approbation of all the relatives descended from the mother's brothers' sons; and the deed itself did not show that any one of them had approved at the time of the execution; and for these reasons it was held that the deed was not valid.

From this decision Mohun Lal appealed to England.

There being no question as to the sastras in use in the family, the opinion of the Judge, that the deed was not valid without the consent of the relatives descended in the male line, as guardians, and that the concurrence of the heirs (the descendants of mother's brothers' sons), at the time of executing the deed, was necessary to the validity of the deed, were the principal points upon which the decision, adverse to Mohun Lal, was founded, and must have been the grounds of the appeal.

The appeal was not prosecuted, and the death of the Rany (which soon afterwards took place) gave rise to a new claim in new circumstances.

The estate was in the possession of the Collector of Midnapore, or of the Court of Wards.

Independently of any deed of gift, the descent was cast upon the heirs of Raja Ajeet Sing, which, according to the Dayabhaga, and the sastras in use in Bengal, were the descendants of the mother's brothers' sons, but which, according to the Mitackshara, were the male descendants of a distant ancestor of Raja Ajeet Sing.

The Rany died on the 17th September 1812. Immediately afterwards, Kundurp Sing, who is now represented by the appellants, alleged, that, on the day before her death, she had executed to him a deed of gift of the Zemindary; and he, as donee under that deed, and also alleging himself to be the heir of Raja Ajeet Sing, claimed to be entitled to the possession of the zemindary. Mohun Lal Khan also claimed to be entitled to the possession, founding his claim on the deed of gift to him, and the confirmation of it before that time by all the persons whom he alleged to be the heirs of Raja Ajeet Sing.

On the 25th of September 1812, it was ordered by the Court of Zillah Midnapore, that Mohun Lal Khan and Kundurp Sing, and any other persons having claims to the possession of the zemindary, either by inheritance or any other right, should present petitions to the Judge of the Zillah.

Mohun Lal and Kundurp Sing and others, having accordingly presented their petitions, the Judge proceeded to a summary trial thereof, and, on the 24th of December 1813, recorded his opinion as follows:—

First, that the deed under which Kundurp claimed was fabricated after the death of the Rany, and that the right of Kundurp to the property was not proved or established, either by the deed or by hereditary right, according to the sastras.

Secondly, that according to the bewusta entered in the decree of the 31st of August 1812, the sons of the brothers of the mother of Raja Ajeet Sing were his heirs, and after the demise of the Rany entitled to the zemindary.

Thirdly, that those heirs had transferred their hereditary rights in the property to Mohun Lal. But, *Fourthly*, notwithstanding these circumstances, the appeal of Mohun Lal to England being pending, the Judge thought it proper that the zemindary should remain in the custody of the Court of Wards until the appeal to England should be decided.

But this proceeding being transmitted to the Court of Sudder Dewanny Adawlut for information and orders, that Court, on the 14th of February 1814, after noticing the reasons for not prosecuting the appeal, and that the authority of the Court of Wards had ceased, considered it to be right and proper that the Judge of the Zillah Court should give effect to his summary decision, and if, on consideration of the particulars set forth in his proceedings of the 24th of December 1813, he conceived Mohun Lal to be the person entitled to, and the malik of the zemindary, and if Mohun Lal were able to give security for conforming to the decrees of the Court on other claims, the Judge might withdraw the zemindary from the custody of the Court of Wards, and put it into the possession of Mohun Lal.

Mohun Lal obtained possession in the result of these proceedings. Kundurp appealed to the Court of Sudder Dewanny Adawlut, and continuing to claim both as donee under this deed and also as heir of Ajeet Sing, prayed a review of the judgment against him. But the Chief Judge of the Court of Sudder Dewanny Adawlut, on the 12th of September 1815, considered that as, in the summary decision given in the cause, permission was granted to any person who had, according to the sastras, claim to the zemindary left by Raja Ajeet Sing, to sue for the same in the Provincial Court, in order that, after a full and final enquiry, ascertaining at the same time the rule observed in the family and the sastras that are in force, the right be awarded to the rightful owner, it was not necessary or useful to make any further investigation in the summary cause. And the petition of the appellant, praying for a review of the decision, was not allowed.

In consequence of this decision, Kundurp, in November 1815, commenced his action against Mohun Lal and others, in the Provincial Court of Calcutta, to recover possession of the zemindary.

He claimed, as before, to be entitled under the deed of gift of the 16th of September 1812, and also as heir by descent in the male line. He admitted that he had four uncles who were more nearly related than himself, but alleged that they were satisfied with his being proprietor of the zemindary, and had relinquished and consigned to him all their rights to the zemindary.

Mohun Lal, by his answer, alleged that the deed of gift, under which Kundurp, the plaintiff, claimed, was a forgery, and that, according to the sastras, the plaintiff could not in any way be entitled to the zemindary; and he insisted in substance that the sastras in use in Bengal, and not the Mitakshara, were the authority according to which the persons who were the heirs of Raja Ajeet Sing were to be determined.

The suit was the subject of great litigation; many witnesses were examined, and the reports or opinions of several Pundits were obtained and considered.

The decree of Mr. Turnbull, in the Provincial Court, was pronounced on the 21st of February 1826. He determined that the claim of the plaintiff, founded on the deed of gift, could not be supported; and that, if it had been genuine, it could have no effect, for want of the consent and concurrence of heirs. And considering the plaintiff's claim, in the character of heir of Raja Ajeet Sing, he stated it to be clear that, if in this suit the Dayabhaga and other sastras current in Bengal were the test, there was no doubt as to the right of the defendants. But that, on the other hand, if the judgment were conducted with reference to the Mitakshara sastra and other books subordinate thereto, the right of the plaintiff preponderates over that of the defendants.

And on a consideration of the whole case, the Judge expressed his opinion that the alleged rights of the plaintiff had not in any way been proved or established; and he ordered that the plaintiff's suit be dismissed with costs.

From this decree the plaintiff appealed to the Court of Sudder Dewanny Adawlut. The appeal was heard before Mr. Ross, and on the 30th of October 1830, he pronounced his decree, and thereby, after referring to the evidence and the bewustas of the Pundits, he dismissed the appeal of the plaintiff and affirmed the decree of the Provincial Court dismissing the bill. From that decree the present appeal is presented.

There were three questions in the cause: *first*, was the plaintiff's deed of gift genuine? *secondly*, if genuine, was it valid? *Thirdly*, if genuine and not valid, was the plaintiff entitled as heir?

But as the validity of the deed, even if it was genuine, depends on the concurrence of the heirs, the two last questions depend upon the single question, who were the heirs? and if the persons alleged by the plaintiff to be heirs, were not heirs, the deed, even if genuine, would not be valid. For this reason it is not strictly necessary for us to give any opinion upon the question whether the deed was genuine.

But considering the circumstances in which the deed is alleged to have been executed by the Rany on the day before her death, the witnesses stated to have been then present, the length of time during which Kundurp, though often called upon, neglected to produce the deed, and the whole of the evidence in the cause, we think it right to state our concurrence in the opinion which has been entertained by every Judge who had considered the case, that the deed is not genuine but a forgery, and consequently that the plaintiff could establish no claim under it.

The question whether the descent in this family is to be regulated by the Dayabhaga and the sastras in use in Bengal, or by the Mitakshara, is really the only one to be considered.

Now in the long litigation in which the Rany Seeromany, under whom Kundurp claimed as donee, was engaged with Mohun Lal, it was, without any objection on her part, allowed by her vakeels, and assumed and held by the Court that the descent of this zemindary was regulated by the sastras in use in Bengal,

The whole proceeding was conducted on that footing, and the decision in favor of the Rany was founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line, who (though they were not heirs) were guardians or protectors of the widow.

After the death of the Rany, Kundurp himself alleged that the suit between Mohun Lal and the Rany had been decided in her favor agreeably to the sastras and the customs of the family ; and in the present case it was shown that decisions affecting lands in Midnapore were founded on the sastras in use in Bengal. Several bewustas in other cases were produced ; and from the bewustas obtained in this cause, and the other evidence on behalf of the defendants, we think that, although the evidence is in some respects inconsistent, there is, on the whole, quite sufficient reason to conclude that the Dayabhaga, and not the Mitackshara sastras, ought to be applied to the decision of this cause. And we shall therefore report to Her Majesty, that in our opinion the appeal ought to be dismissed, and the decree of the Sudder Dewanny Adawlut affirmed with costs.

Decree affirmed with costs.

The 17th December 1847.

Present :

Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Confiscation (Regulation XI. 1796)—Joint Hindoo Family—Ancestral Property—Widow.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Mussumat Golab Koonwar and others,

versus

The Collector of Benares.

Under Regulation XI. 1796, the Governor-General in Council could pronounce an order of confiscation in cases of persons charged with offences of a criminal nature who should abscond or conceal themselves so as not to be found upon process issued against them. After the issuing of the attachment by the Court and the subsequent declaration of forfeiture, everything previous to the attachment must be presumed to have been regularly and legally done unless such presumption were rebutted by sufficient evidence.

Where a forfeiture was declared against three or four brothers constituting a joint undivided Hindoo family,—HELD that the forfeiture did not enure for the benefit of the fourth brother, nor did it effect the rights of the fourth brother who was entitled to his fourth share in all the ancestral property of the family, and that the widow of the ancestor was also entitled to maintenance.

*The Chancellor of the Duchy of Cornwall (T. P. Leigh).—*THE suit in this case was brought for the recovery of large estates in the province of Benares which had been seized by the East India Company on the ground of a forfeiture alleged to have been committed by the owners.

The appellants who claim the estates are the widow and three surviving sons of Ujaib Sing. The respondents are the Collector of Benares, defending the suit on behalf of the Company, and Rajah Oodit Narain Sing, to whom a part of the confiscated property has been granted.

Ujaib Sing appears to have held, under different grants from the Rajah of Benares, very extensive estates. These estates, or a great part of them, were in his life-time regranted to his eldest son Sheo Pursan Sing. In 1786 Ujaib Sing died, leaving the appellant Mussumat Golab Koonwar his widow, and Sheo Pursan Singh, and the appellants Sheo Ruttun, Sheo Ummur, and Kampta Persad Sing, his four sons, surviving him. In 1799 an insurrection broke out in Benares, in which the three eldest sons of Ujaib Sing were accused of being implicated, the fourth, Kampta Persad, being then a minor. The supposed delinquents were summoned to appear and answer the charge against them, but they absconded and could not be found.

After certain proceedings had taken place, the regularity of which is disputed by the appellants, an order was pronounced by the Governor-General in Council on the 30th of January 1800, declaring the estates of the Baboos Sheo Pursan Sing, Sheo Ruttun Sing, and Sheo Ummer Sing to be forfeited, and directing the Collector of Benares to hold them subject to the disposal of the Government.

Under this order all the estates held in the name of Sheo Pursan Sing were confiscated. A portion, consisting of the Pergunna of Kole Usla, was granted to the Rany Golab Koonwar for her life, subject to a heavy mortgage made by Sheo Pursan Sing; and on the death of the Rany, in 1805, this part of the property was granted on the same terms to her son the respondent Rajah Oodit Narain Sing.

In 1803 the appellant Mussumat Golab Koonwar presented a petition to the Governor-General for a restoration to her of the confiscated estates, which she alleged to be her hereditary property: she was referred by the Governor-General to the Courts of Law for the establishment of any claim which she might have.

In 1810, with the sanction of the East India Company, she filed in the Provincial Court of Benares the plaint which is the foundation of the present proceedings. This plaint states the whole of the confiscated property to have been the ancestral property of her late husband, Ujaib Sing, though transferred into the name of Sheo Pursan Sing, his eldest son, and to have been enjoyed after the death of Ujaib by the plaintiff and her sons, and prayed that it might be restored to the plaintiff.

It does not appear that the other appellants ever became personally parties to this suit, though they seem from time to time to have concurred with the plaintiff in presenting petitions to the Court in incidental matters.

The defendants relied upon their title under the order of confiscation, and after a variety of proceedings not necessary to be stated, the case came, on the 15th of August 1816, to be heard before Mr. Courtney Smith.

Mr. Courtney Smith appears to have considered that the confiscation was founded on acts of rebellion supposed to have been committed by the sons of Ujaib Sing; and, as no proof of any such acts was to be found, he was of opinion that the confiscation was entirely illegal. He held that the whole property was to be considered as belonging to the widow and sons of Ujaib Sing, and he decreed that it should be reserved to them accordingly.

It is obvious that at this time the real nature of the case was not understood. The confiscation was not founded on any supposed act of rebellion, but on the failure of parties summoned to appear, to come in under the summons, and which failure was alleged to empower the Government, under the terms of the Regulation after stated, to declare a forfeiture.

It may be observed that, even if the foundation of the decree had been sound, it was very singular in form. For, supposing the property to have belonged to the sons of Ujaib, not one of them was a party to the suit. It did not appear whether Pursan Sing was alive or dead, and the decree was made at the instance of a party who had no title in favor of persons who, if they had a title, were not parties.

We advert to the form of the proceedings, not because our judgment will at all turn upon it, but because it will be found material with reference to one of the points urged before us at the hearing.

From this decree there was an appeal to the Sudder Court both by the Collector and by the Rajah. The Collector in his petition of appeal did not object to the decree, so far as it restored to Kampta Persad any property belonging to him, but it required only that what did properly belong to him should be ascertained.

Although the three sons of Ujaib were not parties to the original suit, they became parties to both appeals and put in joint answers with their mother

Mussumat Golab Koonwar. In both these documents, all the property in dispute is claimed as ancestral property which has come from Ujaib Sing.

In the course of the proceedings in the appeal, the grounds on which the confiscation had proceeded were further investigated. Additional evidence was produced, and the nature of the title, under which the various portions of the disputed property had been held at the time of the confiscation, was examined, and on the 9th of November 1819, the decree of the Sudder Court, now appealed from, was pronounced.

By this decree the Court reversed the judgment of the inferior Court, and, holding the confiscation to be valid, decided that it took effect as to all the estate and interest which Sheo Pursan Sing and Sheo Rutton and Sheo Ummur Sing had in the property; and it then proceeded to declare in what parts of the property Kampta Persad was to be held to have an interest, and directed such property to be restored to him. But it took no notice of any right of Mussumat Golab Koonwar to maintenance, a right which does not appear from the proceedings to have been adverted to.

From this decree the present appeal is brought. It has been contended before us by the appellant :—*First*, that the Government had no authority to pronounce a sentence of forfeiture in this case, even if all necessary forms had been observed. *Secondly*, that all necessary forms were not observed. *Thirdly*, that if the sentence were valid, the forfeiture would enure for the benefit, not of the Government, but of Kampta Persad. *Fourthly*, that all the property in the name of Sheo Pursan ought to have been treated as an ancestral property. *Fifthly*, that if not, the four brothers constituted an undivided family, and that all the acquisitions of Sheo Pursan would be part of the joint stock. And, *lastly*, that at all events Mussumat Golab Koonwar was entitled to maintenance out of the whole of the property of Ujaib.

The first question depends on the Regulation XI of 1796, printed in the Supplemental Appendix. That Regulation provides for two cases :—

First, resistance to process of the Courts. *Secondly*, for cases of persons charged with offences of a criminal nature, who shall abscond or conceal themselves, so that, upon process issued against them, they cannot be found.

The present case comes within the second class.* The provisions are, in substance, that in such cases proclamations shall be issued by the Magistrate requiring the absent party to appear to answer the charge within a period not less than a month. In default of appearance, if the absentee be a proprietor paying revenue immediately to the Government, the Magistrate is to order the attachment of any lands of the absentee within his jurisdiction by issuing his precept to the Collector of the District, directing him to attach the lands and hold them till further notice.

Then follows the sixth and last Clause, which is in these words :—“Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it and upon the future disposal of the lands as he may judge proper.”

No words can be more general and extensive than these. But it was agreed that they could not be intended to include a forfeiture or confiscation of the lands, because in the other case provided for by the Regulation, namely, that of resistance to process, forfeiture of the lands is expressly enacted.

The two cases are obviously very different. But it will be found on examination that the terms of the enactment applicable to the first case confirm the construction which we put upon the Clause now in question.

In case of resistance to process, the Magistrate is to declare the forfeiture; but that sentence is to be reviewed by the Nizamut Adawlut, which may either confirm or modify it. If confirmed, the proceedings are to be transmitted, before the sentence is carried into execution, to the Governor-General in Council, “who will

"finally determine whether the sentence of forfeiture shall be put in force or commuted to a fine, or otherwise; and who, whenever he may order the land or lease of the offender to be forfeited to Government, will at the same time cause the necessary instructions for the future disposal of the land to be conveyed to the Collector through the Board of Revenue." These words are substantially the same as those of the 6th Section. We have no doubt, therefore, of the right of the Governor-General in Council to pronounce an order of confiscation in such cases as the present.

But it is said that the proceedings were irregular. Now it is not disputed that process was issued against the parties, that they absconded, that their lands were attached by the Collector under an order from the Magistrate, that six months elapsed without their appearance, that the case was reported to the Governor-General in Council, and that a sentence of forfeiture was pronounced. But it is contended that the attachment ought only to have issued after certain proclamations had been made in a particular form and with certain ceremonies, and that there is no evidence that those forms and ceremonies were strictly observed. We are of opinion, that, after the issuing of the attachment by the Court and the subsequent declaration of forfeiture, we must presume all things previous to the attachment to have been regularly and legally done, and that there is no sufficient evidence to rebut that presumption. It is unnecessary, therefore, to consider what might have been the effect of any such irregularity if it had been proved to exist.

The next proposition of the appellants was a very singular one, namely, that the forfeiture declared against three of the brothers was to enure for the benefit of the fourth, in direct opposition both to the letter and spirit of the Regulation, which declares that the forfeited lands shall be at the disposal of the Governor-General in Council: neither principle nor authority was advanced in support of such a proposition, and it is obvious that it cannot be maintained.

An opposite view of the subject appears to have been suggested by the Commissioners of Forfeited Estates in the course of these proceedings, namely, that when the Government has made grants to individuals, as in this case to Sheo Pursan Sing, the whole property granted to him by the Government ought to be held forfeited by his delinquency, without regard to the rights of participation in the property which might belong to members of his family. No such question, however, has been raised in the course of these proceedings. On the contrary, the decree affirming the rights of Kampta Persad, as far as his share is concerned, is not objected to. That question, therefore, is not before us.

The next point for consideration is whether the decree has given to Kampta Persad all that he was entitled to, assuming his interests to be unaffected by the forfeiture.

The decree proceeds on the principle of giving him all that appears to have been held in his own name, and the fourth of all that the Court considered to have been the ancestral property of the family,—to have come, in short, from Ujaib Sing.

It is said that he ought to have had one-fourth of all that was held in the name of Sheo Pursan,—*first*, because all should have been treated as ancestral,—*secondly*, because, at all events, the brothers constituted an undivided family, and therefore he was entitled to a share of the whole, whether ancestral or not.

Upon the second point it may be sufficient to observe that no such case is made in any part of the proceedings. The suit in which the present appeal is brought was instituted by Mussumat Golab Koonwar alone, claiming the property which had belonged to Ujaib Sing, and that case is adopted by the other appellants when they became parties to the proceedings. No other title is set up, and Kampta Persad takes under this decree the whole of the estate held by him in his own name.

The question, then, is whether the decree ought to have treated as ancestral property, the whole of what was granted to Sheo Pursan, or a larger portion of it than is actually so treated.

These are questions on which it is scarcely possible for this Court to come to a very satisfactory conclusion, for it depends upon the usages prevalent in the country and the inferences to be drawn from documents, naturally informal, and in which it is very difficult to trace the identity of the property. In some of these documents the grant is made to Ujaib Sing, in others to Ujaib Sing and his children, or with other words indicating a continuance of the estate in his family after his death. In some of them, property is granted to Sheo Pursan or Sheo Pursan and his children, which never appears to have been held by Ujaib at all.

The grant being in the name of Sheo Pursan (who appears alone so far to have dealt with a large portion of it, Pergunna Kole Usla, as to mortgage it in his own sole name), it is for Kampta Persad to make out his title to a share of any portion which he claims. The Court below appears to have held that the mere circumstance of property which had been held by Ujaib and, in some instances, by preceding members of his family, being afterwards transferred by a renewed grant in his life-time to Sheo Pursan, was not sufficient to evidence an hereditary interest, especially when the jumma or rent, reserved to the Government, had from time to time varied, but that where the grant originally to Ujaib Sing, was in terms which showed that it was to continue in his family after his death, the property must be treated as ancestral.

We are not prepared to say that this principle is erroneous, and we have carefully looked through the whole of the evidence in this case in order to see whether it appeared in any instance to have been misapplied. The judgment in this case has been delayed in order to afford us the opportunity of making this examination, and not from any doubt which we entertained, at the hearing, on the points of law.

There is one portion of property, and one only, which upon this investigation it appears to us ought to have been included in the ancestral estate, namely Futtehpore. The case appears to stand thus:—The title depends upon two documents nearly contemporaneous—one a sunnud from the Rajah of Benares, dated the 17th July 1785, which will be found in page 38 of the Appendix, the provisions of which are: “Be it known to the present and the “future mutsuddies for the “affairs of the amla of Pergunna Kole, situate in Sircar Juanpore,” and so on, “that, as Mouza Futtehpore, appertaining to the aforesaid pergunna (kharij-jumma), “with the exception of the revenues of the sircar, together with the sayer, is in the “name of Thakoor Burriar Sing, mâhf of old, therefore, upon the former rule, the “same has been rendered mâhf in favor of my friend Baboo Ujaib Sing; you are “desired not to molest the said Baboo in any way whatever as respects the afore- “mentioned mouza, but to leave it to the enjoyment of the said Baboo, and you “shall not demand a fresh sunnud for him annually.”

The other document is a sunnud from the Collector of Benares, dated the 16th of September 1785, which is found at page 64 of the Appendix, and it is in these words:—that “As the village of Futtehpore in the above Pergunna has been “formerly granted as mâhf to the deceased Thakoor Burriar Sing, considering, “therefore, the rights of Baboo Ujaib Sing, as heir to the above Thakoor, the “above village is to be continued as formerly, mâhf to the above Baboo, his heirs “and descendants for ever.”

As against the East India Company and those claiming under them, we think these documents are quite sufficient to establish that this property was hereditary in the family of Ujaib Sing.

The only other question is the right of Mussamut Golab Koonwar to maintenance out of the whole of the property held to be ancestral. Nothing was urged at the bar against this right, and it appears that, on the principle of the decree, it ought to have been recognised before.

We shall, therefore, report to Her Majesty our opinion that, upon the whole, the decree complained of should be varied by declaring that the village of Futteh-

pore ought to have been treated as ancestral property, and included as such in the estates, of which one-fourth part is by the decree allotted to Kampta Persad, and that Mussamut Golab Konwar ought to have been declared entitled to maintenance out of the whole of the ancestral property, and that the case should be remitted to the Court below, with directions to give effect to the above declarations, and that the decree complained of should, in other respects, be affirmed without costs.

The 24th February 1848.

Present :

Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Lease—Surety—Ejectment—Damages.

On Appeal from the Sudder Dwanny Adawlut of Bengal.

Rajah Burroda Kant Roy,

versus

Ram Tunnoo Bose and others.

Where a person became surety for the due performance by the lessee of the obligations contained in a lease for a term of years, and afterwards became a partner with the lessee, and the lessor evicted the lessee before the expiration of the lease,—Held that a suit would lie by the surety for damages arising from the illegal ejectment, although the surety was not a party of the original contract with the lessor.

Explanation of the principle of assessing the damages.

The Chancellor of the Duchy of Cornwall (T. P. Leigh).—THIS was an action brought by the respondents against the appellant to recover damages for the loss alleged to have been sustained by the former, through the wrongful act of the appellant. The wrong complained of was the ouster of the respondents from certain leases in which they allege themselves to have been interested under a grant made by the ancestors of the appellant.

In 1816 the father and uncle of the appellant held the Pergunna of Syedpoor, in the District of Jessore, as zemindars, subject to the payment to the Government of an annual revenue of 43,296 rupees.

The revenue had fallen into arrear, the zemindars were involved in debt to a large amount; and in order to raise a sum of 54,000 rupees, they agreed to grant a lease to a person named Narayun Sing, of the Pergunna of Syedpoor, he undertaking to raise the required loan, and to pay the amount by instalments out of the rent of the Pergunna.

Narayun Sing appears to have been connected with a family of the name of Bose; one of this family, Ram Dhun Bose, was a banker, and from him and his partner this loan was intended to be raised.

• The first document connected with this transaction is dated 30th March 1816. It is a memorandum signed by Narayun Sing, and addressed to the Rajahs. The effect of it is that Narayun Sing, is to receive the rents of the Pergunna, of which the profits payable to the lessees, after discharging the revenue to Government, are stated to amount to 13,100 rupees, and of this 7,000 rupees per annum are to be paid to the bankers, leaving 6,100 rupees for the Rajahs. Out of this sum 105 rupees are to be deducted by way of allowance to Narayun Sing, leaving 5,995 rupees for the Rajahs. If anything further can be received from the ryots, one-half is to be paid to the Rajahs. If, on examination of the roll and papers and enquiry in the District, the rent is found to be less than it is rated at by the parties, an allowance is to be made to Narayun Sing.

On the 9th April a corresponding document is signed by the Rajahs, and addressed to Narayun Sing. On the same day a grant is made by the Rajahs to Narayun Sing, of the Pergunna in question for a period of ten years, which is obviously intended to be in conformity with the agreement of the same date.

On the 12th of April a corresponding document, or as we should call it, a counterpart of the lease, is signed by Narayun Sing. That is stated at page 48 of the Appendix, and the material portion of it is in these terms:—"This engagement has been written by Narayun Sing in the year 1222. You have given me a lease of the entire Pergunna of Syedpoor, your zemindary, upon my application from the year 1223 to the end of 1232, for a term of ten years. I do hereby voluntarily give this engagement of my own accord; that I shall have possession in the district, and pay the annual rent according to the roll, after deducting the expenses of management and servants' allowances at Chaneda in the sum of 56,397 sicca rupees, of which I shall pay the revenue of the pergunna, fixed in the Collectorate, the sum of 43,296 rupees 3 annas 10 gundas and 2 kowries, according to the instalments monthly into the Collector's treasury, and deliver to you receipts under the seal and signature of the Collector, and receive receipts from you." It then provides for the payment of 7,000 rupees to the bankers, and the 6,100 rupees to the Rajahs, omitting the allowance of 105 rupees, which was provided to be made by the agreement with Narayun Sing.

From these documents the mode in which the rent is estimated sufficiently appears. Discarding from consideration for the present the sum of 11,792 rupees, to which we shall afterwards advert, the produce of the estate is calculated, after deductions, at 58,692 rupees. From this is allowed for expenses of management 2,295 rupees, leaving for actual rent 56,397 rupees, omitting the smaller denominations of coin.

Ram Nursing Bose became surety for the due performance of the engagement of Narayun Sing.

On the 29th of April 1816, a memorandum is made between Ram Nursing Bose, Ram Dhum Bose, and Narayun Sing, by which their interests as partners with him in the lease are recognised, Ram Nursing Bose having a 4-anna share.

In the end of the year 1816, it was represented by Narayun Sing that the income of the estate was less than it had been represented according to the roll, and that after deducting the sums allowed for management, and also a sum of 105 rupees (which had been mentioned in the agreement which preceded the lease, but had been omitted in the lease itself), the net rent, instead of 56,397 rupees, would be only 54,981 rupees. Thereupon this memorandum is signed by Narayun Sing, and Ram Nursing Bose, as surety, is a party to it, which agreement is simply to reduce the rent in the manner pointed out in this memorandum.

It is clear that at this time there was no profit upon the lease, that is, no recognised or legitimate profit beyond that which might arise from the large allowances for management.

Previously to the year 1819, by the death of one of the Rajahs, and a transfer of his interest by the other, the pergunna in question became vested in the appellant. The new owner being a minor, the property came under the care of the Court of Wards, a Court which appears to have a double jurisdiction, the guardianship of infants' estates, and the protection of the public revenue.

In July 1820 the Collector of the District, where this property was situate, examined into the circumstances of the minor's property and the conditions of this lease. It appeared to him, not perhaps very unnaturally that this lease was most detrimental to the infant, and he considered that it contained such evidence of fraud and oppression practised by the lessee towards the lessor, that in a letter addressed by him to the Court of Wards on the 1st of July 1820, he advised that the Court, as of their own authority, should annul the transaction, and make a new lease of the property.

The Court of Wards, however, considered that this proceeding would not be justifiable, and that the existing arrangement could only be set aside by a suit instituted by the minor for that purpose. They wrote a letter to this effect to the Collector on the 11th July of 1820, recommending that, if a new arrangement can be

made with the assent of the lessees, it should be done. They conclude their letter with this paragraph :—"As the Court are of opinion that the settlement of Syedpoor, formed by the late Rajah cannot be disturbed, it will be necessary to require the farmers to give security for the fulfilment of the existing engagements, or those which they may assent to under the preceding instructions; at all events the regular liquidation of the Government revenue must be secured."

In November 1820 the Government consented to advance two lacs of rupees to the Court of Wards, to enable them to pay off the incumbrances on the minor's estate.

On the 2nd of February the Collector wrote to Narayun Sing, and required him to come to a settlement upon fair terms for the property which he held, giving him notice that if he refused to do so, the money due on the mortgage should be paid off and the lease annulled. What was done upon this does not appear, further than that Narayun Sing did not consent to make any new arrangement.

The Bengal year 1227 terminated in the month of April 1821, and the only evidence we have of what took place is a statement in a letter of the Collector to the Court of Wards of the 5th July. From this it appears that in the beginning of the year 1228, which would mean in April or May 1821, he called upon Narayun Sing to give the security required by the last paragraph of the letter of the 11th July 1820, and at the same time issued a proclamation to the ryots, prohibiting them from paying any revenue to the farmers until such security should be tendered and accepted.

Now this seems a somewhat harsh proceeding; in February the Collector is insisting on the lease being set aside. In April or May, without any further communication with the lessee as far as appears, he for the first time required security for performance of the condition of the lease, and prohibits any payment by the ryots until it is tendered and accepted.

It is said that at this time the revenue was in arrear. The Judges in the Court below appear to have considered that this was not the fact. There does appear there to be evidence that about two months' revenue was unpaid at the end of the year 1227. No demand, however, seems to have been made for payment, and it is not at all referred to as the ground on which security was required, or on which the lease was to be attached.

On the 20th of June 1821, notice is given to Narayun Sing, that unless he furnishes security, the lease would be attached; several persons were accordingly proposed as sureties by Narayun Sing, amongst others a person named Bunmally Bose. They were all, however, rejected by the Collector, who on the 5th of July 1821, communicated what he had done to the Court of Wards in the following letter :—"It appearing that the farmers of Pergunna Syedpoor have never furnished the security required by the last paragraph of your predecessor's letter of the 11th July last, I beg leave to acquaint you that previously to allowing them to commence the collections of the present year, and with the view of securing the regular payment of the Revenue of the Government, I called upon them to furnish the security required, and at the same time I issued a proclamation to the ryots prohibiting them from paying revenue to the farmers until such security should be tendered and accepted. Narayun Sing, the recorded farmer of Syedpoor, has offered as his security the five persons noted in the margin, but as they are all sharers with him in the farm, I rejected their security. The security of Bishonath and Bunmally Bose is besides inadmissible for other reasons, as the former is security to a large amount for the treasurer of this office, and also for one of the record keepers." Then it mentions the objections to other parties; then he says, "A period of 15 days having elapsed since the issuing of the above order, and no other security having been tendered by the farmer, I beg leave to propose that, as the collections of the year are at stand, the pergunna be immediately attached."

On the 6th of July, the day after this letter, he serves a further notice on Narayun Sing, in these terms :—" Be it known to Narayun Sing, farmer of the Pergunna of Syedpoor, that you have been often required to furnish good security, "you have not yet furnished it ; if you intend to furnish good security, you are to attend at ten o'clock to-morrow with good security. Consider this as peremptory."

On the 17th of July the Court of Wards wrote as follows to the Collector :—" I am directed to acknowledge the receipt of your letter of the 5th instant. Unless the farmers of the pergunna abovenamed are in balance, the Court consider the measure pursued by you, as contained in the first paragraph of your letter premature, and should not have been adopted without a previous report to the Court. With reference to the last paragraph of your letter, the Court desire that if, when you receive these orders, the farmer has not tendered responsible security, you will attach the estate and, after the prescribed manner, issue advertisements inviting proposals for the farm for the unexpired period of the minority."

The Collector appears to have discovered that the objection which he had made to Bunmally Bose as a surety, *viz.*, that he was interested in the lease, was unfounded, and he therefore withdrew that objection, but he considered that he was not a sufficient security, and required some additional security to be provided. Narayun Sing did not provide such additional security, but he offered to deposit rupees 10,000 until the security bond should be executed by Bunmally Bose. This offer was rejected, and in the month of August 1821, the Collector attached the estate and entered into receipt of the rents. On the 15th of August 1821, he wrote to the Court of Wards, informing them of what he had done, and on the 17th of August the Court returned an answer approving of what had been done, but directing that advertisements should be issued for the re-letting the property according to the regulations (which seem to have required an interval of 12 months), and directing that if, in the meantime, good security was afforded, the farmer should be restored to possession.

In September 1821, Narayun Sing appears to have petitioned the Zillah Court for relief. The Court refused to interfere, a decision which was confirmed by the Sudder Court on appeal in June 1822. In the meantime, the estate was let by the Collector for a large increased rent of rupees 81,026. This arrangement was communicated by the Collector to the Court of Wards on the 18th of February 1822, and confirmed by the Court of Wards on the 11th of June 1822.

Ram Nursing Bose having died, leaving the present respondents his representatives, a suit was instituted, in July 1826, by them, together with Narayun Sing, against the appellant, to recover damages for the loss which they had sustained by being turned out of possession under the lease : Narayun Sing afterwards withdrew his claim, and the suit was continued by the respondents.

After much litigation in the Courts below, and much difference of opinion amongst the Judges, on the 4th of April 1837, final judgment was pronounced for the plaintiffs, awarding to them a sum of rupees 38,531, together with interest upon part from the time of their expulsion, and upon the whole for the end of the term of 10 years, in the lease.

Against this judgment the present appeal is brought, and the ingenuity of Counsel has suggested a great many objections, some of which do not appear to us of much weight :—

First.—It is said that the respondents were not parties to the contract with the Rajahs, and therefore could not sue for any breach of it. The answer is obvious, that the suit is not founded in contract, but in a wrong alleged to have been done by the appellant in depriving the respondents of property in which they had a valuable interest.

Secondly.—It is said that Ram Nursing Bose could not have any interest in the lease, because he was a surety for the due performance of the obligations con-

tained in it by the lessee. A passage was cited from "Colebrooke's Digest" to support this objection. It does not, however, appear to us to have any bearing on the case, and we have no doubt that Ram Nursing Bose had an interest for any injury to which he was entitled to compensation.

Thirdly.—It was said that this was a mere mortgage transaction, which the mortgagors had a right to terminate by payment of the mortgage money. This does not appear to us to be the exact nature of the transaction. Narayun Sing engaged to procure a loan in consideration of having a beneficial lease for ten years; he did procure the loan, and his interest could not be defeated by paying off what was due to the lenders.

Fourthly.—It was next said that the revenue was in arrear at the time when the lease was attached, and that there was power under the lease in that case to resume possession of the estate. If this had been the ground on which the attachment took place, it would have been necessary to examine very particularly into the evidence in order to see whether anything had occurred which enabled the lessor to take advantage of a forfeiture; but in fact it is quite clear that no proceeding was ever taken upon any such ground, and that the lease was annulled because the lessee had failed to provide the security required by the Court of Wards on behalf of the appellant.

The only substantial questions in the case are: *first*, was that Court justified in annulling the lease upon this ground? *Secondly*, if not, have the damages done to the respondents been assessed upon a reasonable principle?

It is clear from the documents already referred to, that the security required was for the performance of the engagements contained in the original lease, and not merely for the payment of the revenue to the Government. If any doubt could exist on this point, it would be removed by reference to the security bond proposed by the Collector for execution by Bunmally Bose, which is stated in the Supplemental Appendix, page 4.

Then was there any right in the Court of Wards, acting for the minor, to require this security? The original lease, with a surety whom the lessor considered sufficient, had been granted by the ancestors of the minor. That surety was still alive, and no change is shown to have taken place in his circumstances. It would be singular if the circumstance of the estate devolving on a minor could enable the Court of Wards on his behalf to interfere with, and alter the terms of, a contract made by those through whom he claims. No authority of any kind has been produced to show the existence of so extraordinary a power, and we must therefore assume that no such authority exists. If this be so, the dispossession was clearly wrongful, and the respondents were, in our opinion, entitled to maintain their action.

But there remains a question hardly less important, upon which we find it quite impossible to concur in opinion with the Court below, *viz.*, the principle upon which they have assessed the damages. In the first place they have given damages to the respondents as being entitled to a 12-anna share, or twelve-sixteenths of the lease.

Now the only evidence in the case of Ram Nursing Bose having any interest at all is found in the agreement of the 29th April 1816, already referred to, by which Ram Nursing Bose would be entitled to a 4-anna share, and the answer of the appellant in this suit according to which he would be entitled to a 5-anna share.

A suit was referred to by Mr. Wigram, from which he argued that it was to be inferred that Narayun Sing and Ram Nursing Bose were the partners, and the only partners in the lease. But, upon examining that suit, it does not even show that Ram Nursing Bose had any interest whatever in the lease; he is treated merely as a surety. How, then, is it possible to hold, as the Court below has done, that Ram Nursing Bose had a 12-anna share?

Again, with respect to the computation of the loss, the Court appears to us to have adopted a very erroneous principle. They have held that under the original

lease the lessee had a clear profit rent of 12,843 rupees, and holding the respondents entitled to three-fourths of that sum, they consider them to have had a profit rent of 9,632 rupees per annum, and they give them that sum for 4 years, amounting to above 38,500 rupees.

The profit rent is thus made out. They treat the sum of 11,792 rupees suspended in the original lease as a profit rent intended to be kept by the lessee. They then say that it appears that in the Bengal year 1227, that is to say, in the last year of their holding, the lessee had increased the rents of two portions of the property by the sum of 2,097 rupees; to one-half of this increase the lessees would be entitled, and adding this sum (1,048 rupees) to 11,792 rupees, the amount will correspond with the sum stated in the judgment.

The question then is, ought the sum of 11,792 rupees to be treated as a profit rent to the lessees? In other words, was it intended that the lessee, as a consideration for procuring a loan of 54,000 rupees, should have not only all the other advantages secured by the lease, but a gratuity of 1,17,920 rupees? for this would be the sum which he would receive during the ten years' term.

If anything so monstrous was intended, it should have been expressed in the most distinct terms. But so far is this from being the case, that the engagement of Narayun Sing is distinct to pay the annual rent according to the roll; and none of the Counsel on either side at the hearing could explain the item from which this extraordinary inference is drawn. The natural interpretation to be put upon it, as we think, is that from the gross sum appearing upon the roll, a deduction of 11,792 rupees was made in respect of sums which, for some reason or other, would not be received during the lease.

This construction is quite consistent with the agreement which preceded the lease, with the subsequent reduction of rent in consequence of the deficiency in the roll, and with the whole conduct of the parties.

In a letter of the Collector of Jessore of the 1st of July 1820, already referred to, this sum is spoken of as a sum suspended without any assigned cause. In the answer of the Court of Wards, it is suggested that this suspension could hardly have been made without some sufficient or at least ostensible cause, and that they could not assume that the parties were fraudulently withholding so considerable a portion of the revenue.

We are satisfied, therefore, that this was not a sum in which the lessee was intended to take any interest. The profit which he was to derive from the lease was, however, considerable. *First*, he was allowed between 2,000 and 3,000 rupees for the expenses of management; *secondly*, he was to have 5 per cent on balances; *thirdly*, he was to have one-half of any increased rent which might be derived from the property through new arrangements, which it was contemplated might be made with the ryots, by a new settlement and re-measurement of the property. If he derived any profit beyond this, such profit would not have been according to his agreement, but in fraud of it, and we think it cannot be allowed.

We agree with the Court below in thinking that the respondents could not claim a share of the profits made by the new lease, because such profits were not made, and it does not appear that they could have been made by the original lessees; nor have we any means of judging whether any, or, if any, what profits could have been made, or would have been made, by them.

In strictness, the proper order* would be to vary the decision of the Court below by declaring that the respondents, instead of twelve-sixteenths, were entitled only to five-sixteenths, of the whole value of the lease, at the time of eviction; that, in computing the value of such lease, no allowance ought to be made for the supposed profit rent of 11,792 rupees, but that allowance ought to be made for one-half of any increased rent which has been secured by the lessee before the eviction, and also for any excess of the sum allowed to the lessor for expenses of management, beyond the necessary expenses of collection; and that regard ought

also to be had to the chance of any increase of rent which the lessee might have fairly expected to receive.

It is obvious, however, that the Judges below could have little better means of fixing a fair amount of damages than we have, and we propose, after declaring the principle on which we proceed, to name a gross sum by way of damages, and thus put an end to all further litigation. Taking the damages for the whole period of five years, we think a sum of 10,000 rupees is proper to be allowed as of the date of our judgment, with interest at 6 per cent. from the date of our judgment till payment. We shall leave the costs below unaltered, and give no costs of the appeal.

The 29th February 1848.

Present :

The Duke of Buccleuch, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir E. H. East, and Sir E. Ryan.

Hindoo Law—Adoption—Acquiescence—Ancestral Property—Division—Partition.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Rungama (widow) for herself and on behalf of Lutchmeputty Naidoo,

versus

Atchama (widow) Ramanadha Baboo, and Puttoory Cally Doss.

Atchama (widow),

versus

Ramanadha Baboo.

According to Hindoo Law, a second adoption (the first adopted son still existing and remaining in possession of his character of a son) is invalid. The acquiescence of the first adopted son, after he came of age, in the division of property made by the adopting father between his two adopted sons, was not equivalent to a previous consent (binding on the first adopted son,) to the disposition of the ancestral property by the father, but was binding on the first adopted son with regard to other property of which the father had the power of disposing by an act *inter vivos* without the consent of the first adopted son.

The Right Hon'ble T. Pemberton Leigh (Chancellor of the Duchy of Cornwall).—THE question in these appeals relates to a very large property in the Northern Sircars, which in the year 1798 belonged to a zemindar named Vencatadry.

Vencatadry being childless, on the 2nd of April 1798, adopted as his son a boy named Jaganadha. On this occasion he signed a paper, bearing date the 7th April, 1798. In this paper, after reciting the adoption, he proceeds to say, "Therefore be it believed that I have executed this, my Tutelar Deity bearing witness, that "Jaganadha Naidoo is *huckdar* or heir to my zemindary mirasy, to my wealth and debts; and that I have it not in my power, on any account whatever, to make "over (the same) to any other person besides him (Jaganadha Naidoo)."

Of the fact, or of the validity of this adoption, no question is made. He afterwards became desirous of adopting another boy, named Ramanadha, and of dividing his property between them. It is said by the appellant, and many witnesses have sworn, that he consulted certain Pundits as to the validity of a second adoption, and was advised by them that a second adoption could not be legally made.

It was contended by the appellant that, upon the whole evidence, it was to be inferred that, in consequence of this opinion, although he brought up Ramanadha as his son, he never adopted him with those religious ceremonies which were necessary in order to constitute a valid adoption according to the Hindoo Law. We have no doubt, however, that he did whatever was necessary to constitute a valid adoption, if such second adoption could, by the Hindoo Law, be valid. This last adoption took place in 1807. Various steps seem to have been taken by Vencatadry during the minority of both these boys with a view to divide his property between them.

In 1815, Jaganadha attained the age of eighteen, when by Hindoo Law he came of age. After this, in 1816, Vencatadry made a new division between his two sons, Ramanadha being still under age, as it seems, about nine years old. Jaganadha took possession of the property so allotted to him, and Vencatadry seems to have remained in possession of what was allotted to Ramanadha. In the course of the year 1816 Vencatadry died. Jaganadha claimed the whole of the property of Vencatadry, alleging that the adoption of Ramanadha was invalid, and at all events did not constitute him a co-heir.

Much dispute took place upon this subject, and various proceedings were had before the Board of Revenue, which had seized a large portion of the property for payment of arrears of revenue. Suits were instituted for the purpose of determining the rights of the parties, into the particulars of which it is not necessary to enter.

The first of the suits now in controversy began in 1820, being a suit instituted by Ramanadha against Jaganadha, to establish his right to that portion of the property which had been allotted to him in his character of adopted son by Vencatadry. This suit was still pending when Jaganadha died. In 1824 a decision was pronounced against Ramanadha, from which, however, he appealed; and before the appeal had been heard, and on the 28th of February 1825 Jaganadha died. He left no natural-born issue, but two wives, Rungama and Atchama, and a boy, who had been brought up in his house, and who is said to be his adopted son, named Lutchmeputty.

The question then arose, who was entitled to succeed to the estate of Jaganadha; the question of what the estate of Jaganadha consisted, that is, whether he was entitled to the whole or only half of the estate of Vencatadry, still remaining unsettled. With respect to the right of succession to Jaganadha, it is not disputed that if he left a son, whether natural born, or legally adopted, such son would be entitled to succeed—that if he left no son, but an undivided brother, such brother would be entitled to succeed—that if he left no son, nor undivided brother, the widows, or one of the widows, would be entitled to succeed.

On the death of Jaganadha, Ramanadha set up a title to the whole estate of Vencatadry, alleging (not very consistently with his former claim) that he and Jaganadha were undivided brothers, and that Jaganadha had left no issue, natural born or adopted.

Rungama at first acquiesced in the claim of Ramanadha, it being alleged by her that she was deceived by Ramanadha, who got authority to act for her, while it is alleged by other of the parties that she colluded with him.

Lutchmeputty was a child of about six years old, and no claim was brought forward on his behalf. Atchama, however, instituted a suit claiming the whole of the estate of Jaganadha, and insisted that she was entitled to inherit. Afterwards, Ramanadha and Rungama having quarrelled, the claim of Lutchmeputty was advanced. After long litigation with various fortune in the Indian Courts, the Sudder Adawlut decided that Jaganadha and Ramanadha were undivided brothers, and that Lutchmeputty was not the adopted son of Jaganadha; that, consequently, Ramanadha was entitled to the whole inheritance which had come from Vencatadry; and against this decree the present appeals are brought.

The questions for our decision relate, *first*, to the estate of Vencatadry; and *secondly*, to the succession to Jaganadha. The conflicting parties are—*First*, Lutchmeputty, who claims the whole inheritance which came from Vencatadry, on the ground that Jaganadha was the only adopted son of Vencatadry; and that he, Lutchmeputty, is the adopted son of Jaganadha. *Secondly*, Atchama, who insisted that Lutchmeputty was not well adopted, and that she, as eldest widow, is entitled to succeed to the inheritance of Jaganadha. *Thirdly*, Rungama, who maintains the case of Lutchmeputty, but insists that, if he is not the adopted son, she is entitled to share with Atchama in the succession of Jaganadha. *Lastly*, Ramanadha, who maintains the decree as it stands.

A further question is made, in which all the other parties concur in contending against Ramanadha, that if he was well adopted, and therefore a brother of Jaganadha, they were divided, and not undivided brothers, and therefore, though Ramanadha might be entitled to his share of Vencatadry's property, he can have no right of succession to Jaganadha.

As far as concerns Ramanadha, his whole title depends on the validity of his adoption. If he was not well adopted, he was neither a co-heir with Jaganadha nor heir to Jaganadha.

The first question, therefore, is as to the validity of a second adoption; the first adopted son still existing, and remaining in possession of his character of a son. This appears to have been long a point of great doubt in Hindoo Law, and it is stated by the Judges in this case to be unsettled.

Three classes of authority have been referred to: *first*, the opinions of the Pundits appearing in the course of the proceedings; *Secondly*, the native authorities as found in the Hindoo treatises; and *Thirdly*, the European authorities.

First, as to the Pundits. There is considerable difference of opinion amongst them. If the appellant's evidence is to be believed, a number of Pundits and learned men gave their opinion against the validity of the adoption to Vencatadry in his time; and this at a period when their bias would probably be to favor the wishes of the powerful Raja who consulted them.

On the death of Vencatadry, there is a certificate signed by 140 Brahmins that the adoption of Ramanadha was invalid. But as this was an opinion procured by Jaganadha, then in possession of the estate, but little weight probably is due to it.

On the other hand, in 1818, before the institution of suit by Ramanadha, the Northern Provincial Court took the opinion of their own Pundit, and of the Pundits of the Centre and Southern Division of the Court on these questions:—*First*, is a person, having conjointly with a wife adopted a son, and thereafter being displeased with her, and marrying a second wife, authorized by Hindoo Law, conjointly with her the second wife, to adopt a son? *Secondly*, a person adopting a son, having for any reason adopted a second son, is the former or the latter heir to the estate of the person adopting, or are both sons entitled to share the same?

These Pundits being at a distance from each other, giving separate opinions at some intervals of time, without, as it appears, any communication between them, all agreed in holding that the second adoption is good, and that both sons are equally entitled to inherit. These opinions seem to be as free as any opinion can be, from suspicion of undue influence.

When the case came before the Sudder Court, two of the Pundits consulted were in favor of the adoption, and one against it. The reasoning of the two Pundits in favor of the adoption is certainly very unsatisfactory; but still, as far as the law is to be collected from the opinion of the Pundits to be found in this case, the preponderance is in favor of the adoption. These opinions, however, are by no means conclusive. And the appellants contend that the native authorities upon which they are founded are strongly against the validity of a second adoption. These authorities, like the opinions of the Pundits, are not reconcileable with each other. In the digest of Hindoo Law on Contracts and Successions, with a Commentary by *Jagannatha* translated by Mr. Colebrooke, the question is discussed and treated as one on which a difference of opinion prevailed. The most material passages of the treatise are found in pages 386, 389, 395, 397. The author holds the better opinion to be that an adoption is valid, although a previously-adopted son, or even a natural-born son be already in existence. The main foundation of that opinion being an ancient text, "That many sons are to be desired, in order that one may travel to Gaya."

It was attempted, in a most ingenious and able argument on behalf of the appellants, to reconcile this authority with others, apparently of a different

tendency, by showing that the author intended, not that many sons of the same description might be adopted, but that he referred to sons of different descriptions, of which there were twelve recognised in the remote ages of Hindoo antiquity though only two are now allowed,—the son given, and the legitimate son. Another suggestion was that the author intended only that the second adopted son may have the rights of a son in the event of the failure of the existing issue, natural or adopted.

We find great difficulty in adopting either of these suggestions : at the same time it must be owned that the doctrine is not very clearly stated, nor very easily to be reconciled with some of the authorities to which it refers ; and with respect to the right of inheritance of the second son, we rather collect the author's opinion to be that the second son would succeed, as in the case of a son well adopted by one having no issue, to whom a son is afterwards born, namely, to one-third only of his father's estate.

What, however, may be the effect of this practice, its authority is far outweighed by two other Hindoo works expressly on the subject of adoption—the *Dattaka Mimamsa* and the *Dattaka Chandrika*. The first passage, sec. 1, plac. 3, in the former of these works, is the citation of a text of an ancient sage, *Atri*, in these words :—"By a man destitute of a son only, must a substitute for the same 'always be adopted.'" This, perhaps, standing alone, might be held to mean that, upon such an one only was it incumbent to adopt a son. The Commentary, however, excludes this construction, for it says, sec. 1, plac. 6 :—"By a man 'destitute of a son only'—the incompetency of one having male issue is signified 'by the term 'only' in this passage.'" The author then, after quoting a text from *Menu* much to the same effect with that cited from *Atri*, observes that the instances of adoption by certain illustrious persons of sons, although they already had male issue, must be considered as exceptional cases, and not as generally authorizing the act. In the next paragraph 12, the author seems to concede that a second son may be adopted with the sanction of the existing issue.

The *Dattaka Chandrika*, sec. 1, plac. 3, cites the same text from *Atri* and *Menu*, and puts the same construction on them as the *Dattaka Mimamsa*.

We think that these treatises are more distinct than the work of *Jagan-natha*—they are written on the particular subject of adoption. They enjoy, as we understand, the highest reputation throughout India, and their weight is strong against a second adoption. In the ordinances of *Menu*, translated by Sir William Jones, we find this passage in page 315 :—"He whom his father or mother, 'with her husband's assent, gives to another as his son, provided that the 'donee have no issue, is considered as a son given.'"

In the *Viva Darnava Setu*, translated by Mr. Halhed, chap. 21, sec. 9, the proposition is distinctly stated :—"He who has no son, or grandson, or grandson's 'son, or brother's son, shall adopt a son ; and while he has one adopted son, he 'shall not adopt a second.'"

If we are to form our opinion of the law from the effect of these authorities, we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption.

At the same time it is quite impossible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindoos, with which we cannot be familiar.

It is satisfactory, therefore, to find that, under the third head to which we have adverted, the European authorities, there is much assistance to be derived from the labours of those who have investigated this subject, with all those advantages of familiarity with the laws and languages of Hindoostan in which we are necessarily

deficient. Here, unfortunately, as everywhere else, there is some discrepancy in the authorities.

Sir Thomas Strange, in his *Elements of Hindoo Law*, Volume 1, page 78, second edition, expresses himself as follow :—"In general, it is in default of male issue that the right is exercised ; *issue* here including a grandson or great grandson. "But as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death duly authorised, so even where the first subsists, a second may take place, such having been the pleasure and will of husband, upon the principle of many sons being desirable, that some one of them may travel to Gaya, a pilgrimage considered to be particularly efficacious in forwarding departed spirits beyond their destined place of torture." In support of those propositions, he refers to two cases in Mr. Macnaghten's Reports—*Shamchunder v. Narayni Dibeh* (1 Ben. Sud. Dew. Rep. 209), which was decided in 1807 ; and *Goureepershaud Rai v. Mussamut Jymala* (2 Ben. Sud. Dew. Rep. 136), which was decided in 1814.

Now the first of these cases decided only that a second adoption is valid when the first adopted son has died without issue, a point of law which is not disputed.

In the second case, a man having two wives gave authority to each of them to adopt a son ; one of them made the adoption. He himself, together with the other wife, afterwards made an adoption, and it was finally held that the two sons were entitled equally to inherit to the husband.

This was a very peculiar case—it certainly seems to assume the validity of a double adoption ; but the doubts in the case seem to have been rather as to the effect of the second adoption by the husband himself in revoking the authority given to the wife, than on the validity of a second adoption while a first adopted son is living.

This decision was stated by the Court to be in conformity with the preceding case of *Shamchunder v. Narayni Dibeh*, which, in truth, for the reason already mentioned, in no degree supports it.

These we believe are the only European authorities referred to on behalf of Ramanadha. With reference to these cases it may be observed that they have never been considered as settling the law upon this subject. In a note to the case of *Narayni Dibeh v. Hirkishor Rai* (1 Ben. Sud. Dew. Rep. 42), which it seems was supplied to the reporter by Mr. Colebrooke, the translator of *Jagannatha's Digest*, he states the point as one of doubt, and in which, although the authority of *Jagannatha* was in favor of the adoption, the weighty authority of *Dattaka Chandrika* was the other way. Every European, without any exception, as far as we have any information, who has since examined the subject, has come to a conclusion adverse to the second adoption. In a Note to Strange's *Elements of Hindoo Law*, Vol. II., page 85, second edition, the law is thus stated by Mr. Sutherland, a very high authority :—"A Hindoo cannot have legally adopted *children* ; "a son legitimate or adopted existing, any subsequent adoption would be invalid ; "at least the son so adopted would not inherit."

In Mr. Sutherland's *Synopsis of the Hindoo Law of Adoption*, page 212, he thus expresses himself :—"The primary reason for the affiliation of a son being the obligatory necessity of providing for the performance of the exequal rites celebrated by a son for his deceased father, on which the salvation of a Hindoo is supposed to depend, it is necessary that the person proceeding to adopt should be destitute of male issue capable of performing those rites. By the term 'issue,' the son's son and grandson are included. It may be inferred that if such male issue, although existing, were disqualified by any legal impediment (such as loss of caste) from performing the rites in question, the affiliation of a son might legally take place."

In Mr. Steele's *Synopsis of the Law of Hindoo Castes*, he states, page 48 :—"An adoption can take place only where no begotten son or grandson exists, or

"where the begotten son has lost caste." Again, at page 52 :—"In the case of the death of an adopted son (and total loss of caste is considered equivalent to death), another may be selected and given in the same manner ; but a man, after adopting one boy, cannot adopt another at the desire of a second wife, &c. Only one adopted son can subsist at one time." It is true that the Treatise purports to relate to the customs of the provinces of Bombay, but we are not aware of a difference between the different provinces on this point, though there appears to be some minor differences on other points of the law of adoption, and for this the last Section of the *Mitackshara* is referred to. The last paragraph in this page seems to be the statement of different opinions collected from different quarters, and, as might be expected, not very well agreeing with each other. But by far the most important authority is Mr. William Macnaghten, whose Principles and Precedents of Hindoo Law were composed, as appears from the preface, after collecting all the information that could be procured from all quarters, and after a careful examination of all the original authorities and of all the opinions of Pundits recorded in the Supreme Court for a series of years.

This work was published after his report of the two cases already referred to, and of course he could not but be acquainted with them ; indeed he refers to one of them.

Now Mr. Macnaghten states the law as he considers it to be, without the slightest doubt or hesitation. He says, Vol. I., page 80 :—"It is clear that a man having adopted a boy, and that boy being alive, he cannot adopt another ;" and he examines the text that "many sons are to be desired, in order that one may travel to Gaya ;" and says that it applies only to natural-born sons. We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr. Macnaghten is constantly referred to in the Supreme Court as all but decisive of any point of Hindoo Law contained in it, and that much more respect would be paid to it by the Judges there than to the opinions of Pundits. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring as he does entirely in the law as stated in Macnaghten.

The Judges in the Sudder Court state that they are aware that this has been long considered a doubtful point, and they seem to proceed entirely on the opinion of the Pundits who favor the second adoption.

On examining the reasons assigned by those Pundits, they rest upon two main points : *first*, the text that "many sons are to be desired in order that one may travel to Gaya ;" *second*, upon the doctrine that "he who has only one son, is to be considered childless."

Now, the first of these texts is entirely out of the case, if Mr. Macnaghten's explanation be correct ; and as to the second, in referring to the passages on which the Pundits rest, they manifestly relate not to a person who receives a child, but to one who gives a child, in adoption.

Upon the whole, therefore, for these reasons (which, as the point is of great general importance, we have thought it advisable to explain very fully,) we have come to the conclusion that the adoption of Ramanadha was not valid, and that the judgment of the Sudder Court upon that point must be reversed.

If we had come to a different conclusion on this subject, it would have been necessary for us to examine into the effect of the deed alleged to have been executed by Vencatadry on the adoption of Jaganadha, and upon which one of the Courts below held that the subsequent adoption was invalid, as far as regarded the right of inheritance ; but our view of the first point makes this unnecessary, and also removes all question as to the alleged division between the supposed brothers. Feeling the hardship of this case on Ramanadha, we have looked with some anxiety to see whether his title could be maintained, on the ground that it was subsequently recognised by Jaganadha, and that such subsequent recognition might be considered equivalent to a previous assent. We think it, however, impossible to maintain his right

upon this ground. Supposing Jaganadha to have acquiesced after he came of age in the division of property made by Vencatadry, it was an acquiescence on the footing of a right already asserted by the father to exist in Ramanadha, and it does not appear that Jaganadha possessed all the knowledge, or was placed in the circumstances which must exist in order to make his ratification binding even if we assume, what is not by any means clear, that such subsequent ratification would be equivalent for that purpose, in Hindoo Law, to previous consent. It appears, however, that there was some property, both real and personal, of which Vencatadry had the power of disposing by an act, *inter vivos*, without the consent of Jaganadha, and we think that he made a gift, as far as he could, of his property between his two sons. Applying, then, to this case a principle not peculiar to English Law, but common to all law which is based on the rules of justice, namely, the principle that a party shall not at the same time affirm and disaffirm the same transaction—affirm it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice,—we think that effect must be given against the estate of Jaganadha, to the intentions of Vencatadry, as far as he had the power of effecting them. If Jaganadha takes, as we think he is entitled to do, the whole ancestral property which the father could not dispose of without his consent, we think he must give up for the benefit of Ramanadha the whole property included in the division to the disposition of which his consent was not necessary.

Ramanadha being removed from the contest as to the succession of Jaganadha, the question as to that succession is in dispute between Lutchmeputty and Atchama, for Rungama, though she may have the same interest with Atchama, in opposing Lutchmeputty, supports his title. This is a mere question of fact, upon which, as in almost all cases from India, the evidence is contradictory, and the decision must turn very much upon the probabilities of the case, to be collected from those facts which are sufficiently established.

In the year 1819 the situation of Jaganadha was as follows :—He had married two wives, but had never had any issue by either of them. He is stated by some of the witnesses to have been from bodily infirmity very unlikely to have issue. This is so far confirmed by undisputed facts, that he lived for six years afterwards with Rungama, and never had any issue. He might therefore reasonably presume, or perhaps knew, that he should have no natural-born son, or at all events no such son by Rungama.

With Atchama he had quarrelled in April 1819; and previously to the alleged adoption, she had quitted his house, to which she never seems to have returned till after his death. Under these circumstances it cannot but be held probable that he should choose to adopt a son. But this probability is much confirmed when we consider the relation in which he stood towards them, who, if he left no issue, natural or adopted, would succeed to his joint possessions. Either Atchama, with whom he had quarrelled, would take alone or jointly with Rungama, or Ramanadha, with whom he was at law, and whose character of a brother he denied, would succeed. Nothing is more natural than that he should desire to disappoint these parties. Now, it is proved beyond all question by the evidence of Mr. Roberts, the Collector at Masulipatam, that, in the course of the years 1824 and 1825, a boy of an age corresponding with that of Lutchmeputty, and who, by other evidence, is shown to have been Lutchmeputty, was brought by Jaganadha upon several occasions on which he paid a visit at the Collector's Office; and that the boy was treated by Jaganadha, and considered by him, the Collector, as his adopted son. He says that the boy accompanied Jaganadha upon every visit except the first; that he had frequent communication with Jaganadha on the subject; that he considered the boy to be brought in order that he might be recognised as an adopted son; and that so satisfied was he, Mr. Roberts, of the facts, that on Jaganadha's death, in the absence of evidence to the contrary, he should have considered him as heir. The question then is, was this boy well adopted or not? The account given by the appellant is

this :—That in March 1819, Chava Naidamah, a relation of Jaganadha, had a son born to him ; that Rungama, by the desire of Jaganadha, applied to the grandfather of the child to know if the family would give this child in adoption to Jaganadha ; that difficulties were suggested as to the right of Jaganadha to adopt any of the Soodra class ; that he consulted the Pundits, who gave an opinion in favor of such adoption on the 23rd of April ; that this opinion was communicated to Chava Naidmah, who, on the 26th of April, signed an instrument giving his son to Jaganadha, who signed an instrument accepting the boy in adoption, and on the 18th of August 1819 all the necessary ceremonies of adoption were performed, and a certificate of the performance endorsed on the instrument containing the opinions of the Pundits, and signed by twelve persons present at the adoption.

These instruments are produced, and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony beyond the observation which may be made on all Hindoo testimony, that perjury and forgery are so extensively prevalent in India that little reliance can be placed on it.

But the important fact that this boy was brought up and treated as an adopted son, does not depend merely on Hindoo testimony. That there was such a boy, and that he was considered as likely to succeed, is proved not only by Mr. Roberts and his clerk, who, though from his name (Custoory Setaputy) we presume is a Hindoo, appears to give this evidence without the slightest bias, but also by a letter written, or rather forged, by or on behalf of Atchama, in the name of Jaganadha, dated just before his death.

In this letter, Jaganadha is made to state that Rungama was teasing him to leave his estate to Lutchmeputty. The words are :—“ Rungama troubles me much “ to leave by writing the talook, &c., to Chava Lutchmeputty of another gotrum, “ whom she (Rungama) has been taking care of, but I have not consented to it.”

This document, together with the forged will in favor of Atchama, were produced in Court on the 12th of May 1825, immediately after Jaganadha's death.

Now the case made by Atchama is that Lutchmeputty was a boy first brought forward some time after the death of Jaganadha, and that he never was at Amaravati, the residence of Jaganadha, in his life-time. This is clearly contrary to the fact, and contrary to the fact as known to Atchama ; and yet many of her witnesses who say that they were in Jaganadha's house at the time when the alleged ceremonies of adoption took place, and that no such ceremonies, in fact, took place, swear also that Lutchmeputty never was at Amaravati till after the death of Jaganadha. Such evidence can go for nothing.

There are two circumstances, and only two which no doubt are much against the adoption : *first*, the conduct of Rungama, who now brings forward this claim of Lutchmeputty, but who suppressed all mention of it, as it is said, till the quarrel between Rungama and Ramanadha in 1826 ; *secondly*, the absence of proof of any formal notification to the Government, and of that degree of notoriety which might be expected of a fact of so much importance in such a family.

As to the *first* point, there is no doubt that, for several months after the death of Jaganadha, Rungama not only was silent as to the title of Lutchmeputty, but she acquiesced in that of Ramanadha, and signed several instruments quite inconsistent with the case which she now sets up.

It is attempted to remove the effect of these acts by saying that she was under the influence of Ramanadha, and signed what papers were laid before her, in ignorance of their contents, or some blank papers to be afterwards filled up.

There is some evidence that she *did* sign blank papers, and the fact that, if Lutchmeputty was not entitled, she had herself a strong claim to participate with Atchama in the succession of Jaganadha, affords a strong inference that, in supporting the claim of Ramanadha, she was deceived by him, unless she was acting in collusion with him under some secret arrangement.

We cannot say that we are satisfied as to the imposition alleged to have been practised upon her ; and if we were dealing with her rights, we should attribute much weight to this part of the case ; but we cannot attribute much weight to it—perhaps in strictness we ought not to attribute any—when we are dealing with the rights of Lutchmeputty, and when the effect of the act relied on is removed alike by supposing collusion with Ramanadha or imposition by him.

Secondly, with respect to the absence of any formal notification to the Government, it is admitted on all hands not to be necessary. At the same time it affords so easy a mode of preserving unquestionable evidence of a most important fact that, in the case of a great family like this, some written communication would most probably be made, either on the occasion of the adoption itself, or on some subsequent occasion. And we find, accordingly, that communications were made to the Government by Vencatadry, with respect to the adoption both of Jaganadha and Ramanadha, and that he endeavoured to have their titles recognised. The absence of any such communications in the case of Lutchmeputty is, therefore, important. There are, however, circumstances in evidence by which the weight of the objection is very considerably diminished. The adoption was resolved upon in April 1819 ; Amaravati was in the Collectorship of Gunttoor, and, at this time, Jaganadha was at law with the Collector of Gunttoor, who refused to deliver up possession of some portions of the property of Vencatadry claimed by Jaganadha.

It is not, perhaps, very unnatural to suppose that, under such circumstances, Jaganadha would not willingly have any communications with the Collector not absolutely necessary. But there were other disputes at this time between Jaganadha and the Government authorities. Atchama, or her brother on her behalf, had complained to the Civil Magistrate of the conduct of Jaganadha towards her and he had been fined. From some of the documents there seem to have been other differences subsisting between them. That at a subsequent time there was some written communication to the Collector of Masulipatam, in which district a portion of this large estate was situated, there is much reason to believe. A most important letter upon this subject purports to be a letter from Jaganadha to his wife, and has much internal evidence of authenticity. It is dated 13th of July 1819, and is in these words :—“ As Puntooloo has sent me a letter enclosing a foul arzee to the “ authority on the subject of our adoption of a boy, I caused it to be copied fair “ and dispatched it this day through the vakeel because I thought it is proper ; and “ the said arzee was received by the junior gentleman who is vested with the “ authority of Magistrate. There was enmity before between us and certain persons “ in this place owing to one’s malevolence against us ; and it has now occasioned “ enmity between us and another man as well as between us and the authorities of “ this place in consequence of the authorities of the Circuit Court having been pleased “ to expose the calumny used by the persons in this place against us ; conse- “ quently there will happen obstacles to our affair, but I am not uneasy, as “ there does not appear anything that can be supported by the said persons “ regarding the circumstances which is now intimated to us. I herewith send “ the copy of the said arzee, and will inform you the remaining circumstances on “ my arrival at that place.” If this letter be genuine, it is almost conclusive. I observe that one of the Judges below states that the handwriting of this letter is not proved ; but that at all events, it is of no consequence, because, in fact, it is before the adoption, and could not prove that the adoption had taken place. In the enormous mass of documents and parol evidence to be found in this case, far exceeding anything which, in our experience, has been brought before this Committee, it may be difficult to say whether it is or not regularly proved ; but it seems to have been produced in evidence without any objection being made to its authenticity.

The objection which is made to it by the Judge, certainly, is not well founded. The transaction of the adoption might not have been completed at the date of the letter because the usual ceremonies had not been performed, which are represented

to have taken place in the following August ; but the transaction was inchoate—the child had been given in adoption, and received in adoption, in the preceding April ; and the terms of the letter are, therefore, perfectly applicable to the state of circumstances which existed at the date.

Upon this state of the evidence, the probability of the adoption, certainly of a child being brought up in the family, and introduced to the European authorities, with the same state and pomp as if he were an adopted son, with documents and witnesses in great numbers confirming the account, which documents and witnesses are open to no other suspicion than attaches to all Hindoo evidence, we should have had no hesitation in affirming the fact of adoption, if the case had come before us as an original cause.

We have been pressed, however, and very properly pressed, with the argument that this is a mere question of fact to be proved by evidence ; that all the Judges before whom the case has come have disbelieved the evidence ; that they had some advantage in coming to a conclusion which we have not ; and their judgments are to be considered as verdicts of a jury which ought not to be disturbed except upon very strong grounds.

It is impossible not to feel that there is great weight in these observations ; and they have occasioned one of the principal difficulties which we have felt in this most difficult case. We have, however, the same evidence which was in the Court below ; we have had the advantage of a most full and able discussion at the bar ; and this Court is more accustomed to the examination of evidence than the Civil Servants of the East India Company who preside in the native Courts can be supposed to be. We have, further, the great advantage of having the grounds on which these judgments proceeded. We cannot say that they are at all satisfactory to our minds. By far the most important evidence in the case, the evidence of Mr. Roberts, is disposed of by assuming that this gentleman in his deposition, and in a communication which he made to the Board of Revenue entirely in the same sense, immediately on the death of Jaganadha, lay under a misconception of what had passed in a conversation in a language which was not vernacular to either party.

This appears to us a purely gratuitous assumption. It would have been a strong assumption if Mr. Roberts' opinion had been formed from a single conversation ; but he states that he had frequent communications with Jaganadha upon the subject ; that the boy was brought to him by Jaganadha four or five times, was treated by the Raja as his son, and was brought, as he considered, in order that his title as such might be known and recognized. His opinion is founded not merely on what he heard but what he saw, not on one but on several occasions.

Supposing the facts of adoption to be proved, some objections were made to its validity in point of law ; but they do not appear to us to be of any value.

Upon the whole, after very long and anxious consideration of the subject we feel ourselves called upon to differ upon this point also, with respect to the adoption, from the judgment of the Court below, and to hold that Lutchmeputty was well adopted, and is entitled to succeed to the whole estate of Jaganadha, subject to such maintenance as his widows may by law be entitled to.

Our report to her Majesty will be that, as to Puttoory Caly Doss (who seems to have been very improperly made a party to the proceedings) the appeal ought to be dismissed with costs ; that the decree of the Court below ought in other respects to be reversed ; that it should be declared that the adoption of Ramanadha was invalid, and that he was not entitled to be considered as a co-heir with Jaganadha to Vencatadry ; but that under the circumstances appearing in evidence, he was entitled to such property included in the gift made by Vencatadry after Jaganadha came of age, as Vencatadry had the power to dispose of ; that Ramanadha was entitled to retain those portions of such property which came into his possession, and to have restored to him such portions thereof as came into the possession of Jaganadha, or to have compensation made for them out of the estate of Jaganadha ;

that the adoption of Lutchmeputty by Jaganadha was well proved; and that Lutchmeputty was entitled to succeed to the whole estate of Jaganadha; that with these declarations the cause should be remitted to the Court below, with directions to do what may be necessary for giving them effect; that no costs ought to be given in these appeals, or in the suits below, except to Puttoory Caly Doss.

Mr. Wigram.—In the Minutes, as stated by your Lordship, there is no allusion to the widows. I do not know whether that may be necessary.

The Chancellor of the Duchy of Cornwall.—That will be unnecessary.

Mr. Wigram.—Every other point is mentioned.

The Chancellor of the Duchy of Cornwall.—I have mentioned in the Minutes that the succession would be subject to any such right of maintenance as the widows might have.

The 27th June 1848.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir A. Johnston.

Mortgage—Foreclosure—Service of notice.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Rasmonee Debea,

versus

Pran Kissen Das.

According to Section 8 Regulation XVII. 1806 where mortgaged property is situate in two districts, an order of foreclosure relating to the whole property may be obtained in the Court of either district.

The order of foreclosure having been served on the widow of the deceased mortgagor who had life-interest and also was the guardian of the minor adopted son and legal representative of the deceased, the service was held to be sufficient.

Lord Langdale.—THIS appeal is presented from a decree of the Sudder Dewanny Court of Calcutta, of the 21st December 1839, that decree having affirmed a decision of the Principal Sndder Ameen of the Civil Court of Moorshedabad, and this was done in a suit instituted by the respondent as plaintiff against the appellant and others; which suit was founded upon a certain order of foreclosure, which was made in the Court of Moorshedabad upon a mortgage deed set forth in these papers.

It is alleged that the order of foreclosure was irregular, and ought not to be held operative, on the ground that it was granted contrary to Section 8 of Regulation XVII of 1806, of which it is only necessary to state so much as directs that a petition for such an order is to be presented to the Judge of the zillah or city, in which the mortgaged lands or other property may be situated, and it provides that the Judge, on receiving the application, should cause the mortgagor or his legal representative to be furnished with a copy of it.

It is alleged here that the land was not situated in the district of the Court where the order was made, and that a copy of the petition was not served on the proper party.

Now, with respect to the first, we observe that the mortgage deed expressly describes the land to be in the district of Moorshedabad. "I have possessed and enjoyed my paternal talook in the district of Moorshedabad, the Pergunna of Sumskar Bhedurpoor, &c, without the participation of any other."

That was, undoubtedly, therefore, the Court in which it might *prima facie* be supposed an application for such an order as that ought to be made.

Now in the plaint it is stated that the land is situate within the Moorshedabad Collectorate; but in the answer of the Collector, it is expressly stated, "that an order for foreclosure was issued by the Court to his widow Rasmonee Debea, after the expiration of the term of the conditional sale, and that on the expiration of the term of the order for foreclosure, the property sold became the right of the

"plaintiff; but by the proceeding of the City Court dated the 12th July 1837, it is clear that the order of foreclosure was issued by the Moorshedabad Court, and also that the estate of Sumskar Bhedurpoor is under the jurisdiction of the Civil Court of Beerbhoom. The order, therefore, for the foreclosure issued by the Court of this district is contrary to the provisions of Section 8 Regulation XVII of 1806, which have not been at all observed."

To that it was replied that the land in question was within the two districts, and that being the case, the order might be obtained in either of them.

Now it does not appear that any rejoinder was filed to that replication, which was the allegation, on which the cause proceeded.

It then appears that afterwards, it is stated here, there was some application made to the Court of the Sudder Ameen. It certainly is somewhat singular that no description of the circumstances is given under which that application was made; but an application was made to the Court for something or other, and in consequence of that application an order was made by which the question which arose in the cause was to be tried in the Court of Moorshedabad. It related to the cause; it did not relate to the order of foreclosure. But what is there to show in the whole course of these proceedings that these lands were not situated partly in one district and partly in the other district; and what is there to show in the course of the proceedings, that, if that were the case, an order made in the Court of either district would not be a proper order?

We think there is nothing in this case to show that the order was not made in the proper Court.

The next objection made to the order is that there was no service on the proper party. Now the parties who are interested in this case, are the parties who are interested in what is called here the permission to adopt, by which an interest is given to the wife, who is now the appellant, for her life, with a species of power—a power to appoint an heir, which heir, when appointed, would have a right to the inheritance in certain estates—and we are of opinion the service upon this lady, the guardian, was quite sufficient service.

The only other objection which was made to the decree, not the order, is that there was a refusal to examine witnesses, the examination having been prayed for at the time the hearing was going on. Now certainly it does seem as extravagant an application as ever was made to any Court, to ask, in the midst of the hearing, that there should be a permission to examine witnesses over again, those witnesses having been ascertained long before, subpoenas having been issued to compel them to come in and give their evidence, those subpoenas not having been served because they were then about to leave the place; but they might have been served immediately afterwards; and certainly it is not an application that ought to have been made to the Court. Their Lordships therefore are of opinion that there is no ground for this appeal, and the appeal must consequently be dismissed with costs.

Appeal dismissed.

The 7th July 1848.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, Sir A. Johnston, and Sir E. Ryan.

Alluvial Land.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Mussamut Imam Bandi and Wajid Ali Khan,

versus

Hur Gobind Ghose.

The owner of land before it is inundated remains the owner of it while it is covered with water and after it becomes dry.

The Right Hon'ble T. P. Leigh.—THE suit in this case is brought to recover certain land containing something more than 612 beegas lying near the city of Patna. It is claimed by the appellants as part of a mouza belonging to them, called Akbarpoor. The respondent alleges that it is part of a mouza called Raipoor Hussun, which belongs to him; but he insists that, however this may be, he is in possession, and that it lies upon the appellants to make out their title. This is, no doubt, true, and the whole question in the case is, merely, Is or not the land in dispute shown to be part of the Mouza Akbarpoor?

Upon a question of this description, very great weight would, at first sight, appear to be due to the judgment of the Court below. There are circumstances however here, which go far to destroy the authority of the judgment.

The Judge in the Provincial Court was in favor of the appellants. In the Sudder the Judges were divided in opinion; and though three against one concurred in the decision, one of the three decided upon a ground, which was repudiated by the other two, and those two unfortunately mistook the nature of the question which they had to try. They conceived that the question was as to alluvial land, in the sense of land gradually gained from the river, and which, having no other owner, would belong, by way of accretion, to the lands of the adjoining proprietor. Whereas the ownership of the adjoining land, though essential in the consideration of a title founded on accretion, was of little or no value in the issue actually joined between these parties.

To consider, then, the real question. Some evidence has been received in the Court below which, by the rules of English Law, would not have been admissible, and some has been given in a different form from that which those rules would have rendered necessary. But we are here dealing with the law as administered in Indian Courts by unprofessional Judges, and we must look at the evidence which they have received, and consider the effect which it ought to have produced.

Some points seem to be agreed upon between the parties. The whole of the district adjoining the land in dispute, as well as that land itself, is flat, and is very liable to be covered or washed away by the waters of the Ganges, which frequently changes its channel. The land in dispute was inundated about the year 1787; it remained covered with water till about 1801; it then became partially dry, till in the year 1814, it was again inundated. After this period it once again re-appeared above the surface of the water, and by the year 1820 had become very valuable land.

The question, then, is, to whom did this land belong before the inundation? Who ever was the owner of the land then, remained the owner while it was covered with water, and after it became dry.

The tract in dispute, together with something more than 187 beegas already recovered by the appellants, is alleged by them to form the Mouza of Akbarpoor. They allege it to be bounded on the west by the Koocha of Oodha Das, on the east by the Coocha of Kinoo, on the south by Mehrampoor, Moradpoor, and Afzulpoor, and on the north by Raipoor Hussun. This description places Akbarpoor to the south of the Ganges.

The respondent alleges that the whole of the land in dispute is part of Raipoor Hussun, and that, in fact, the whole of the appellant's talook is to the north of the Ganges.

The appellants found their title on a grant by the Emperor Aurungzebe, in the year 1679, to their ancestor, of the Talook of Subulpoor, which is there described as containing 6,756 beegas 12 biswas, and to consist of 11 mouzas, four under the name of Subulpoor, and one named Akbarpoor. This talook was to be held Maddad-i-mash, or free from tribute; and as the same exemption from payment of rent to the Government continued after the country came under the dominion of the East India Company, they had a material interest in having the extent of those lands clearly ascertained and preserved distinct from the lands liable to assessment.

The particular extent of Akbarpoor does not appear by the original grant : but in an Afrad-Tablak, of 1779, it is stated to contain 800 beegas, or about 1,600 English acres.

We have evidence, then, of the existence of the Mouza of Akbarpoor, and of its extent. The question is, where was it situate ?

A number of witnesses produced by the appellants state that its site agrees with the boundaries alleged by them. An equal, or perhaps larger number of witnesses, produced by the respondent, swear that those boundaries include, not Akbarpoor, but Raipoor Hussun.

In this contradiction of oral testimony, which occurs in almost every Indian case, we must look to the documentary evidence, in order to see on which side the truth lies ; and it appears to us to leave no doubt upon the question.

The first document produced by the appellants purports to be a measurement made about the year 1784, in a dispute between the owner of the Talook of Subulpoor and the owner of some adjoining lands. In this document, the Mouza of Akbarpoor is stated to contain 800 beegas, and to extend east and west from Pahleza to Kotabpoor, north and south from Mehrampoor to Raipoor Hussun. These boundaries, according to all the maps, would include the property in dispute.

It is said, however, that no account is given of this document in the evidence, that it appears from a note of the translator to be full of inaccuracies, and that no weight was given to it by any of the Judges below. The other evidence in the case makes it unnecessary to place any reliance on this document, though there appears no reason to suspect that it is not genuine.

The next document produced is a measurement made about the same period, and which seems to have been prepared for the purpose of distinguishing the lands which were exempt from tribute to the Government. It is very minute and particular, and there is no impeachment of its accuracy.

The 19th Article describes Akbarpoor Dakhili of Subulpoor as extending from the south opposite Bara Bungla to Raipoor on the north, and on the north-east from the limits of Kotabpoor, opposite to the Ghat of Kinoo to the limits of Zahidpoor on the west.

Upon examination of the maps, it will be found that this description, though in different language, quite agrees with the preceding document.

We have next a report made by a public officer in the year 1787 upon a question of boundaries, which had arisen between the proprietor of Subulpoor and the proprietor of Govindpoor, about the time when the inundation began. In this report the boundary of Akbarpoor on the west is stated to extend to the Koocha of Oodha Das, and on the east to the Ghat of Kinoo ; and it is described as lying south-west of Raipoor.

We have, then, three documents, all describing the same land by boundaries in substance the same, although the difference of the points referred to, and of the language used in the several descriptions, show them to have been the result of independent surveys.

Upon the main point, however, which, in truth, is decisive of the case, that Akbarpoor lay to the south of Raipoor, and not to the north, there is further evidence.

We have first a survey made by a Government officer in the year 1810, on the alluvial lands of Afzulpoor. In this Akbarpoor is stated to be to the south of Raipoor, and between Raipoor and Afzulpoor.

We have then a map prepared by Moonna Ram in 1812, in a dispute as to boundaries between persons having no connection with this suit, and here again Akbarpoor is placed to the south of Raipoor.

This is the material documentary evidence produced by the appellants, and against it none whatever is offered by the respondent. He does not even produce the description contained in his own title deed, alleging that for some reason, the bill of sale to him was not forthcoming.

He relies, however, upon certain suits which have taken place with respect to Akbarpoor, and upon evidence which has been given, and decisions which have been pronounced, in those suits. They appear to have been of two distinct classes: *first*, between the appellants or their ancestors, and the Government; and, *secondly*, between those parties and the respondent. As the parties to those suits whom the appellants represent varied from time to time, but their interests and title are now vested in the appellants, we shall speak of the parties under the general term of the appellants in order to avoid the detail which would be necessary to explain the various changes and transmissions of interest. We will first consider the controversy with the Government. Soon after the time when the district now insisted to form Akbarpoor became dry, a part of it marked No. 18 in Map F. was claimed and taken possession of by the Government as being alluvial and being subject to revenue. The appellants claiming it as part of Subulpoor, an inquiry was directed by the Government, and the Collector, on the 13th of December 1828, reported in favor of the appellants, finding that the land in question was part of Akbarpoor, and adopting the boundaries of Akbarpoor stated in the documents already referred to.

The Government was dissatisfied with this decision, and brought the case before the Court of Special Commissioners of Patna, who, on the 15th of September 1829, confirmed the decision of the Collector, and an order was given to the Ameen to ascertain the boundaries of Akbarpoor, and the portion of it in possession of the Government.

In the execution of this order it was found that a large portion of the alleged district of Akbarpoor was in possession of the respondent Hurgovind Ghose who objected to having it measured, and accordingly that portion only which was in the possession of the Government was measured, and found to amount to something more than 187 beegas. The remainder of the land, amounting to rather more than 612 beegas, was stated in the reports to be in the possession of Hurgovind Ghose.

In pursuance of these proceedings the appellants or their ancestors were put in possession of the 187 beegas, and have since remained in possession.

It is very truly said on behalf of the respondent that he was no party to these proceedings, and cannot be bound by them. But when it was contended at the bar that the land thus given up to the appellants will satisfy the description of Akbarpoor contained in the preceding documents, the quantity of land contained in Akbarpoor and of the eastern boundaries were both forgotten. Neither of these important conditions is satisfied by limiting the appellants' rights in the manner proposed.

We now come to the disputes between the appellants and the respondent. It seems that in the year 1813 both Raipoor Hussun and Subulpoor having been devastated by the Ganges, a portion of land which had become dry was claimed by the servants of the appellants as part of Subulpoor, and by the servants of the respondent as part of Raipoor, and quarrels leading to a breach of the peace took place between them. In consequence of this the matter came before the Foujdari Court, which, on the 5th of May 1813, after observing very justly that the rights of the parties could only be decided in the Civil Court, ordered that in the meantime the appellants should be confined to the north bank of the Ganges, and the respondent to the south.

It is obvious that this decision involved no determination at all as to the right of boundaries. Accordingly, for the purpose of settling those boundaries, a suit was instituted in the Civil Court of Patna, and on the 18th of February 1816, an order was made which, if taken strictly, would exclude both parties from the land in dispute, inasmuch as it fixes the southern limit of Raipoor Hussun in a manner which would exclude it, and confines Subulpoor to the north bank of the Ganges. But the boundaries as they affect the land now in dispute were not in question, and the order therefore may be laid out of the case.

In 1819 another suit was instituted by the appellants against the respondent, in which the controversy was as to the boundaries of Raipoor and Subulpoor in lands lying to the north of the first sota.

This suit is relied on by the respondent for two reasons: *first*, because in the course of it a map was prepared by Hookum Chund, in which the land now in dispute was described as part of Raipoor Hussun; and, *secondly*, because as it is said if that land was not embraced in that suit, it might have been embraced in it, and therefore it is evidence to show that the plaintiff did not consider this land as belonging to him.

That this suit did not embrace the land in question is perfectly clear; and Hookum Chund, being examined as a witness, states that, when the map in question was prepared, he described the land now disputed as part of Raipoor Hussun upon the statement of the respondent's agent, the appellants or their agents not attending, the question being immaterial, inasmuch as the rights of Akbarpoor were to be determined in another suit to be presently mentioned. These circumstances appear to us to destroy the weight of the first argument.

As to the second argument, it is answered by the fact that, almost immediately after the institution of the suit just mentioned, *viz.*, in 1820, a suit was instituted by the appellants against the respondent and several other parties, claiming the land in question as part of Akbarpoor, but not setting forth with sufficient distinctness the lands which he claimed, or the quantities which he demanded from the several defendants.

Upon this ground his suit was dismissed in 1827, and in 1830 the present suit was instituted against the respondent.

It is not necessary to go through the several proceedings which have taken place in it. The evidence has already been referred to, and after the most careful examination and enquiry the Judge of the Patna Court, Sir James Harington, who resided close to the disputed land, which immediately adjoins the Court House, having the opportunity of examining the site and the different fixed points, and of applying the description given by documents and the oral testimony to the lands to which they refer, ultimately came to a decision in favor of the appellants, and expressed his opinion in a well considered and well reasoned judgment on the 14th of March 1834.

From this judgment there was an appeal to the Sudder, when, unfortunately, the judgment was reversed, upon the grounds which we have already adverted to, which destroy all the authority of the final decree.

We can entertain no doubt that the conclusion to which Sir James Harington came on the evidence was the right conclusion, and that the Court ought to have found that the land in dispute was shown to be part of Akbarpoor.

Two of the Judges relied on another objection to the appellants' claim, *viz.*, that it was barred by length of time. It is very doubtful upon the facts as they now appear whether such an objection, if it had been raised by the respondent, could have prevailed; but it is sufficient to say that the objection was not raised, and that the appellants therefore had no opportunity of meeting it by evidence.

Upon the whole we have no difficulty in coming to a conclusion that the decree complained of ought to be reversed, and that the appellants ought to be put into possession of the land in dispute, and that they ought to be paid by the respondent the amount of the annual value of the land from the time of the institution of the suit in 1830, together with costs in the Court below, and that of this appeal each party should bear their own costs. And we shall humbly report our opinion to Her Majesty accordingly.

The 25th June 1849.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Hindoo Law—Adoption.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Hurraḍhun Mookerjee,

versus

Mothooranath Mookerjee and others.

An adoption may be made either by a man in his life-time, or by one of his wives after his death under a power conferred upon her for that purpose by her husband.

Right. Hon'ble T. P. Leigh.—THE suit in this case was instituted by the appellant against Goluk Chunder Mookerjee, Rushanund Mookerjee, and Unoop Narain Mookerjee. The appellant alleged that he was the adopted son of Ghunsam Mookerjee, the deceased brother of the defendants, and he prayed to be put into possession of the property of Ghunsam. Neither Rushanund nor Unoop Narain appear to have put in any answer to this demand in the Provincial Court. Goluk Chunder, however, put in an answer by which he denied the adoption of the appellant, insisted that he had never been separated either in property or board from Ghunsam, and alleged that Ghunsam had immediately before his death made a deed of gift of all his property to him Goluk.

The Provincial Judge, before whom the case first came, was of opinion that the adoption was not proved, and that the deed of gift to Goluk was proved, and he decreed accordingly.

The Sudder Court on appeal agreed in opinion that the adoption was not proved, but they disbelieved or doubted the genuineness of the deed of gift to Goluk, and they varied in that respect the decree of the Court below, dismissing the appellant's suit without prejudice to this question. From this decree of dismissal the present appeal is brought. Several witnesses on the part of the appellant have sworn to the different facts necessary to prove the adoption. On the other hand, the respondents have produced witnesses who swear to facts inconsistent with such adoption. In such circumstances, much must depend upon the probabilities of the case to be collected from those facts as to which both parties are agreed.

The adoption of the appellant is alleged to have been completed in the autumn of 1824. At this time it is clear that Ghunsam was advanced in years,—about sixty-seven years old; that he had two wives, to whom he had been long married, by neither of whom he had ever had issue, and both of whom were of such an age as to make it in the highest degree improbable that he should ever have by them a son of his body. One is stated by the respondent's witnesses to have been about 57, and the other about 36 or 37. He seems long before this period to have despaired of having such issue, for eighteen years before he had adopted a boy named Banee Madho, the son of his brother, the respondent Goluk Chunder. In April 1824 Banee Madho had died without issue. These are facts as to which there is no controversy.

According to the religious tenets of the Hindoos, a man's state after death, his deliverance from a place of suffering called *Put* (the expression used in the translation of the documents before us is "his salvation"), depends upon his leaving a son to perform certain rites and ceremonies after his death. That these opinions were shared by Ghunsam is clear from the evidence produced on both sides, and he had acted in conformity with them by the adoption of Banee Madho. Is it then more probable that on Banee Madho's death he should supply his place by the adoption of another son, or that he should deliberately and purposely incur the penalties which, according to his opinions, would attend the omission to discharge this duty?

The former proposition is that on which the appellant relies ; the latter must be maintained by the respondent.

An adoption may be made either by a man in his life-time or by one of his wives after his death, under a power conferred upon her for that purpose by her husband ; and the case of the appellant is that Ghunsam had at first, in a fit of sickness, provided for the adoption in the latter form, but that afterwards, having recovered, he made the adoption himself.

The facts establishing these propositions are sworn to by several witnesses, and documents are produced confirmatory of their statement ; and, with an exception to which we shall presently advert, neither the witnesses nor the documents appear to be open to any imputation beyond that which applies to all Hindoo testimony, *viz.*, the facility with which false witnesses are procured, and false documents fabricated.

The probability in favor of an adoption of some child being very strong, is there any improbability that the appellant should be the object of selection ? Upon the evidence he would appear to be the most likely to be chosen ; he was a nephew of Ghunsam, the son of the respondent Rushanund ; he was of a proper age, living in his house, and a great favorite with Ghunsam's sister ; and Goluk appears to have had no other son of an age which would admit of adoption.

On Ghunsam's death, which took place on 30th January 1825, both his wives became suttees. There is evidence that his funeral ceremonies were performed by the appellant ; and on the 25th February 1825, the nazir of the collectorate within which Ghunsam held property, reported to the Collector the death of Ghunsam, and that he had left an adopted son, a minor, named Huradhun Mookerjee.

Ghunsam seems to have left surviving him, besides the three brothers already named —Goluk, Unoop Narain, and Rushanund—a half-brother, Beer Eshur. On the death of Ghunsam, Goluk, either under the alleged deed of gift, or as an undivided brother with him, claimed the whole of Ghunsam's property. In consequence of these claims of Goluk, disputes arose ; and on the 23rd April 1825, a petition was presented by Beer Eshur to the Collector of Nuddea, in which the appellant is mentioned as the adopted son of Ghunsam ; and on the 16th May 1825, a petition was presented to one of the Provincial Courts by Unoop Narain, in which the fact of the appellant's adoption is distinctly stated ; and the same statement is repeated by Unoop in an answer put in by him in a late stage of the proceedings in this cause.

These disputes having led to some breach of the peace, the case was brought before the Foujdary Court ; an order was made, by which Goluk was continued in possession of the property until the right should be determined in the Civil Court ; and in October 1825 the plaint was filed in this cause.

The evidence of the appellant being such as we have stated, the objections made to it by the respondents, and the counter-evidence brought forward by them, are to be considered.

It is first said that the appellant's witnesses who depose to the facts constituting the adoption are for the most part in a low station of life, and likely to be influenced by the appellant. But is sufficient to state in answer that these witnesses depose to the presence, on the principal occasions to which they refer, of many other individuals whom they name, any one of whom might have been called by the respondents, and yet not one single witness is examined for the purpose. One of the witnesses for the appellant is the priest who performed the religious ceremonies of adoption. The fact of the adoption is recognised by two members of the family immediately upon the death of Ghunsam, and, as far as appears by anything produced to us, is not denied by anybody but Goluk and his sons, who, having succeeded to his interest, are respondents upon this appeal.

It was then said that several of the same witnesses who have sworn to the adoption, swear also that their names are written as witnesses to the *unumati*

pattr or instrument by which power to adopt was given by Ghunsam to one of his wives, and that on referring to the transcript of the proceedings no names of witnesses appear. The original document, however, was before the Court below, and successively before several Judges, who on other grounds discredited the witnesses; and if so palpable an objection to their testimony had really existed, we cannot suppose that by all those Judges it would have been overlooked.

The evidence for the respondents consisted mainly of the deed of gift to Goluk and of a report made by the Police of the examination of the widows of Ghunsam on the occasion of their becoming suttees, and of alleged conversations with Ghunsam, in which he is stated to have declared that he neither had adopted nor would adopt another son after the death of Banee Madho.

As to the first document, the deed of gift, we expressed in the course of the argument a clear opinion that it was a forgery, and the Counsel for the respondents hardly attempted to maintain its genuineness.

The other document deserves more attention. It contains the examination by the Police Officers, of the widows previously to their being burned with the corpse of their husband, and they are then stated to have declared that they had no son nor daughter; which, it is said, would not be true if the appellant had been the adopted son of their husband.

On referring to the Regulations, however, under which the official examination takes place, as well as to the nature of the examination itself, we think that the question applies only to the natural-born children, and that it appears from the answer of the widows in this case that they so understood it, for their words are:—"We have no son nor daughter; we are barren." The parole testimony for the respondents is open to the observation that nearly all their witnesses depose either to the execution of the deed of gift to Goluk, or to conversations with Ghunsam in which an intention to make the gift is expressed. Now that deed is palpably a mere fabrication.

In this state of the evidence, if the case had come originally before us, we could have had no hesitation in holding that the appellant had established his case; and the question is, whether we are to attribute so much weight to the judgments already pronounced as to abstain from giving effect to our own opinion. On examining those judgments, we cannot say that the reasons assigned by the Judges are such as to add authority to their decision. The Judge of the Provincial Court appears to have considered that many circumstances were necessary to the validity of an adoption, which (whether usual or not) certainly are not required by law; and to have so far miscarried in examining the evidence or estimating its value, as to be of opinion "that there rests no doubt on the authenticity of the deed of gift of Goluk Chunder."

In the Sudder Court the same error appears to have existed with respect to the law of adoption as prevailed in the inferior Court, and no additional reasons are assigned for disbelieving the appellant's evidence.

Upon the whole we must advise Her Majesty that the judgment complained of ought to be reversed; that it should be declared that the appellant has made out his title as the adopted son of Ghunsam Mookerjee, and that the case should be remitted to the Court below, with this declaration, and with directions, to give that effect to the appellant's claims in this suit which may be consequential upon that declaration.

The 12th February 1850.

Present :

Lord Brougham, Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Practice—Presumption—Mesne Profits—Native Evidence.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Modhoosoodun Sandial,

versus

Soroop Chunder Sircar Chowdhry.

Considering the advantages which the Judges in India generally possess of forming a correct opinion of the probability of a transaction and in some cases of the credit due to the witnesses, the fact that the Courts below have decided against the validity of an instrument affords a strong presumption of the correctness of their decisions but does not and ought not to relieve the Privy Council, as the Court of last resort, from the duty of examining the whole evidence and forming for itself an opinion upon the whole case.

A presumption arises against a claim for mesne profits from non-claim for 7 years.

With reference to the lamentable disregard of truth prevailing amongst the natives of India, the Privy Council held that it would be very dangerous for the Court altogether to discredit witnesses deposing *vide voce* by reason of the necessity imposed on the Court to sift the evidence of such witnesses with great minuteness and care.

The Right Hon'ble the Judge of the Admiralty Court (Dr. Lushington).—THIS is an appeal from the Sudder Dewanny Court of Bengal, and the subject-matter of the suit is the mesne profits of an estate in the pergunna Ookrah, claimed by the present respondent, in whose favor both the Zillah Court of Nuddea and the Sudder Dewanny pronounced decrees.

In the course of these proceedings the appellant, who was the defendant in the Court below, pleaded an agreement contained in an instrument bearing date the 12th of February 1819, and the whole case turned upon the question whether this agreement was a genuine and valid deed, or, as contended by the respondent, a forged instrument.

Both the Courts below have decided against the validity of the instrument, a fact which, considering the advantages the Judges in India generally possess of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favor of the correctness of their decisions, but does not and ought not to relieve this, the Court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case.

We proceed, then, to a consideration of the evidence, and an investigation of the reasons assigned by the Judges in the Courts below for their decision. But before commencing this task, a very brief statement of the facts of the case will be necessary.

The Board of Revenue, on the 29th December 1813, sold a property situate in Zillah Nuddea for arrears of revenue. That property consisted of 271 mouzas, of which 62 constituted dihi Bydnathpore, and 18 turruf Sookhsagur. By two purchases the appellant became the proprietor of one-half of this property, the other half was owned by persons of the name of Bundoojia. For some time joint possession was held of the whole estate, excepting dihi Bydnathpore and turruf Sookhsagur. These two districts the occupants held adversely—and against them suits to obtain possession were brought by the purchasers.

On the 8th of February 1819, these suits being still undetermined, the appellant, who held an eight anna share, sold a two anna share to the respondent. These facts are common to both parties, but with respect to the payment of the purchase-money there is much dispute; it will be necessary here after to advert to this circumstance, but it is more convenient at present to proceed with a statement of the facts which do not appear to be disputed.

On the 23rd of November 1819, the appellant and his co-owners obtained possession of dihi Bydnathpore under a decree of the Court. On the 27th of June 1822, the property was divided under the orders of the Collector, and to the respondent was allotted seven and three-quarter mouzas in dihi Bydnathpore. In July 1826, the appellant sold the whole of his share of this property excepting his share in turruf Sookhsagur and three and a half villages in another turruf, to a Mr. Harris. With Mr. Harris the respondent had disputes as to his share of this property; a litigation followed, which terminated by compromise on the 3rd of April 1832.

The plaint in the present suit was filed on the 8th of July 1833. By that plaint the respondent demands Rs. 49,999 as mesne profits from the 19th of January 1819, to the 11th of April 1826, interest included. It is certainly somewhat singular that such a demand as this, if well founded, should have been so long delayed, no less than seven years having elapsed from the period when the claim ended before the commencement of a suit to recover what is alleged to have been due, yearly at least, if not half-yearly, for seven successive years from 1819. This is surely a circumstance which requires a very satisfactory explanation, for necessarily, after the lapse of so many years, there must be great difficulty in ascertaining the truth of such a demand, not to mention the presumption against it from non-claim for so long a time. It appears, however, from the plaint, and also from other proceedings in this cause, that the respondent in 1824, instituted a suit against the appellant, in which he claimed mesne profits between the 12th of April 1819, and the 14th of December 1823, of this same dihi Bydnathpore. In defence to this suit the appellant pleaded two agreements; one an agreement dated the 12th of February 1819, and the other an agreement dated the 15th of May 1822. The respondent in reply admitted the execution of this latter agreement, and denied the former altogether; various documents are produced, amongst others the two agreements; and the signatures attached to each were compared with each other, but from this comparison no result was obtained. No evidence as to the execution of the disputed agreement was, so far as appears, produced.

The decree of the Court, bearing date the 10th of January 1826, was to this effect, that the respondent should be non-suited, with leave to correct his plaint and bring a fresh suit.

From this period, January 1826, to April 1833, no proceedings were adopted by the respondent to recover any part of these mesne profits. He states himself (for another purpose indeed) to have been a man of wealth and substance; he enters into litigation with Mr. Harris, who purchased from the appellant, but he never till April 1833, attempts to recover either the mesne profits due, as alleged, at the commencement of the suit of 1824, nor those subsequently accruing till 1826, when Mr. Harris made his purchase. There is nothing in the course of these proceedings, that we can discover, which can in any way satisfactorily account for this delay, if the respondent had really and truly a *bona fide* claim to these mesne profits. He was warned by the Judge in 1826 of the errors contained in his plaint according to the conception of the Judge, namely, that being in possession of the property, he claimed for the mesne profits. Whether or not that was a real error we need not decide; but this is clear, that he was at liberty to bring a new suit, and to shape his plaint as he might be advised.

But this is not all. He was distinctly apprised of the nature of the main defence to his action, namely, that his claim was precluded by the agreement of the 12th of February 1819; that the Judge expressed his opinion that the appellant in some part of his defence was attempting to deceive the Court, and yet for seven years the appellant does nothing. Surely it affords no weak presumption against a claim so long delayed, that the respondent, with full knowledge of all the facts, and the nature of the defence, should so long neglect his own interest, with ample means of protecting it.

But to resume the narrative. The answer to this plaint, which is at page 7 of the Appendix of 1833, is substantially, though a great deal of argument is mixed up with the real defence, that the respondent executed on the 12th of February 1819, the deed produced in the former suit, and that by the tenor of that deed the respondent is precluded from maintaining this suit.

This agreement of 12th of February 1819, is to be found at page 92. It will be expedient to state concisely the contents of that agreement, and then to consider whether such contents are consistent with the proved circumstances of the case, and whether the execution of such a deed is, on the whole, probable or improbable. This deed is, in the name of the respondent, addressed to the appellant. It states that a bill of sale and a receipt of the amount value had been executed by the appellant; that the respondent, awaiting the entry of his name in the Collectorate records, had not paid the money, but had executed a bond for it, that five days after recording the name in the records, the money should be paid. The first part of this recital, so far as relates to the bill of sale, is admitted to be true; but in this agreement the receipt is said to bear even date with the bill of sale, *viz.*, February the 8th, whereas, on inspecting it, the date is the same as that of the agreement itself, namely, the 12th of February. This circumstance naturally gives rise to some suspicion; nor is that suspicion cleared away by the explanation offered that the receipt was written on the 8th, but dated afterwards on the 12th, when the bond for payment of the purchase-money is said to have been given.

The agreement then states that the purchase-money was not paid, but that a bond was given for it, conditioned for payment of the money five days after the respondent's name should be recorded in the Collectorate. The bond was, during the interval, not to carry interest, and no claim was to be made for principal during that time. Though at first sight it may appear strange that, instead of natural payment, a bond should be taken, yet there are circumstances which tend to reconcile this arrangement with probability, which is the only reason for examining it, as no dissent exists as to the payment itself, whensoever or howsoever made.

The vendor himself was not in possession of a part of the property purported to be sold. Suits at his instance were depending for the recovery of that property, and the results of such suits must, in some degree, have been uncertain. It was impossible, therefore, for the vendor to give possession of all the property purported to be sold, and consequently not improbable that the purchaser should decline to pay the purchase-money until put in possession. The respondent avers that he paid the money at the time, and that the bill of sale and receipt were duly registered, and so they appear to have been; but surely it was or ought to have been (had not his own delay prevented it) in the power of the respondent to have proved the payment—the sum purported to be paid is Rs. 77,500 in cash, current coin, and before three witnesses. The sum total is between Rs. 7,000 and Rs. 8,000; could it be a matter of difficulty to have proved so large a payment in money, and was it not a most important fact in the cause, as it would have falsified a very material averment in this most important instrument? Yet no attempt is made to establish a fact of this importance. We cannot, therefore, say that this statement in the agreement is wholly improbable, and certainly it is not refuted by the respondent. It is right, however, on the other hand, to observe that there is no proof of the execution of this alleged bond, nor of any payment made under it according to the agreement, omissions which justly give rise to some suspicion. There is nothing contrary to justice in the provision contained in the agreement that, during the period before the entry of the purchaser's name in the books of the Collectorate, no interest should run upon the bond, and, on the other hand, no part of the profits be payable to the respondent.

The agreement then provides that possession shall not be given to the respondent of dihi Byduathpore until, in the event of the pending suit terminating favorably to the then owners of the property, that part of the estate lying in dihi

Bydnathpore had been partitioned off and possession given ; that in the meantime the purchaser should pay the Government revenue, but should have no claim to the profits, the vendor, the present appellant, paying the embankment and other expenses belonging to the pergunnah, and also the costs of the pending suits. If the suit should not be successful, then the rents collected at the joint management office are to be applied to pay the expenses.

It was contended that this arrangement was so unjust and inequitable, so injurious to the interests of the respondent, that the execution of such an instrument by him was grossly improbable ; and of such opinion were the Judges of the Zillah and Sudder Adawlut ; but it does not appear to us that the conditions contained in this instrument are plainly so absurdly unjust as to lead to the conclusion that, on that account alone, the deed should be considered a forgery. Whether those conditions were unjust or not, depends on many facts of which we have no evidence or means of judging, on the result of contingencies the probability of which it is impossible for us to measure ; and even the Courts below, though possessed of local knowledge, could not have adequate legitimate means to accomplish such a task.

We do not think it necessary to follow in detail the remaining contents of this instrument ; an arrangement somewhat similar is made as to Sookhsagar, but this suit has no reference to this property. It was urged against the validity of this agreement-deed, that it had not been registered, and though it does not appear that registration was essential to confer upon it legal force, yet certainly the absence of registration is a circumstance for consideration. The deed of May 1822 was not registered also.

It is now necessary to consider the evidence as to the execution of this agreement-deed, which deed, it must be remembered, was deposited in Court in the suit of 1824. There are five attesting witnesses. The first witness who speaks to the deed is Nushee Ram Ghose, and his name appears as an attesting witness to the agreement of February 12th, and if these papers are correct, he was produced by the plaintiff, the respondent. He deposes to the execution of the agreement, and identifies it ; it is very difficult to say that this witness, so produced, is entitled to any credit, but no observation is made by either of the Judges upon his testimony. We are not able to concur with the Judge in the Zillah Court, that the circumstances to which he refers destroy the credit of the witnesses ; we cannot forget that they are examined seventeen years after the date of the instrument.

Nobeen Chunder, page 122, another attesting witness, also proves the execution and identity of the instrument, so also Ram Koomar Dey, and their testimony is supported by the evidence of Kamulla Kanth and Ram Mohun.

It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindostan, that all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, or unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *viva voce* how necessary soever it may be always to sift such evidence with great minuteness and care. It is a remarkable fact in this case, that the existence of an agreement, bearing date February the 12th, 1819, is admitted. There is produced a deed undisputed, bearing date May the 15th, 1822, consequently, long before the first suit was commenced, which expressly recognizes an agreement-deed, dated February the 12th, 1819. It is said that there was a deed of that date, but that it was of a different tenor. Of this latter averment we do not find the slightest proof ; there is no evidence of any other deed of that date. This defence was not, so far as appears, set up in the former suit of 1829, and surely the

presumption, in the absence of all proof to the contrary, is that this deed of 1822 referred to the deed of February 12th, 1819, produced in this cause, and produced as early as 1824, when it was not even alleged that there was another deed of the same date of a different tenor. Under these circumstances, we consider that the agreement of 1822 affords a strong confirmation of the deed of February the 12th produced by the appellant.

There is another observation made by the Judge of the Zillah Court which we think should be adverted to. The Judge argues that the non-production of this deed in a suit as to Sookhsagur, though it was called for, is an argument against the validity of the deed. We do not sufficiently know the circumstances of that suit to enable us to form any accurate opinion as to the necessity of producing it; but as this very deed long before that suit commenced, was deposited in Court in a prior suit, and placed among its records, it is difficult to conclude, as it was accessible to both parties, that the non-production in that cause is a proof of its being a forgery. Besides, the deed of 1819 was no defence to that claim. Among those papers are to be found numerous extracts from the proceedings in various other suits, relating to some parts of the estate originally sold in 1813. We do not think that any conclusion, as to the main issue in this case, can be safely drawn from those extracts. It is very difficult from such extracts only, to understand accurately such a series of complicated litigation, and still more difficult and dangerous to rely upon isolated parts of former proceedings between different parties, and for different purposes, as applicable to the question in this case. We do not find that the Judges in the Courts below imported them into their reasons for the conclusions to which they arrived, except for the purpose of fixing the amount of the mesne profits. We therefore do not deem it necessary to notice them more particularly.

On the whole, we are of opinion that the agreement of the 12th of February 1819, is established by the evidence produced and that it must be carried into effect. Consequently the claim for mesne profits of dihi Bydnathpore cannot be maintained for the period antecedent to possession on the dihi being completely partitioned off. And we do not find that it was completely partitioned off and possession taken by the respondent at any time during the period for which mesne profits are claimed by this action.

We are therefore under the necessity of reversing the judgment of the Court below, and of the two inferior Courts, and pronouncing that the respondent has failed in establishing his claim. There will be costs in the Courts below, but no costs here.

Lord Brougham.—We dismiss the suit in both Courts below, the Zillah and the Sudder Adawlut Court, with the costs below, but no costs here.

Mr. Turner.—Your Lordships will recollect that there were two appeals; the other appeal will, I suppose, follow the same fate as this; it raised substantially the same question.

The Judge of the Admiralty Court.—That appeal was not argued; it was agreed that the decision upon that appeal should follow the decision upon this.

Mr. Turner.—I think it was, my lord.

Mr. Forsyth.—My learned friend Mr. Loftus Wigram said that he would not consent to the other appeal following the fate of this without saying something upon it, and he said a few words to your lordships upon that second appeal.

Lord Brougham.—We thought that both appeals should be subject to the same fate, but there was a doubt whether Mr. Loftus Wigram should be heard then upon the other appeal, or whether we should decide this first, and we thought it better to take both at once. Judgment was given in both cases below.

The Chancellor of the Duchy of Cornwall.—Are the Counsel on the other side here?

Mr. Turner.—No, my lord; my learned friend, Mr. Loftus Wigram, is not here at present.

Mr. Moore.—My learned friend, Mr. Loftus Wigram, begged me to ask your Lordships to be good enough to hear him upon it when he came.

Lord Brougham.—Do not you recollect that that happened which Mr. Forsyth said? I recollect it, and you would recollect it much more, that we had a doubt whether we should not wait to hear the second appeal till after we had arrived at this stage, and it was thought better to take both together, and Mr. Loftus Wigram was heard upon the second appeal, and the other side did not ask to be heard.

Mr. Moore.—It is very true, my lord.

Lord Campbell.—We had better wait till Mr. Wigram comes before we decide the second case.

Mr. Moore.—I would take the liberty of suggesting to your Lordships that the judgment which has been pronounced might be taken as the judgment in both cases, unless my learned friend, Mr. Loftus Wigram, wishes to address your Lordships upon it.

Lord Brougham.—Very well.

The 22nd February 1850.

Present :

Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Zemindary of Pacheet.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Anund Lal Sing Deo,

versus

Maharaja Dheraj Gurrood Narayun Deo Bahadoor.

Quære.—Whether the zemindary of Pacheet is indivisible or inalienable.

In this case the grant by the former Raja of a portion of the zemindary was held to be only for the maintenance of the grantee, and consequently to be resumable by the present Raja.

Lord Langdale.—IN this case, an action was brought in the Provincial Court of Calcutta by the respondent, the Raja Gurrood Narayun, against the appellant, Anund Lal, to recover from him the possession of the pergunna of Kasaepar part of the zemindary of Pacheet, situate in the Jungle Mehals in the Presidency of Bengal. By the decree of Mr. James Curtis, made in the Provincial Court on the 27th of February, 1829, it was ordered that the case should be dismissed, that the defendant (the appellant Anund Lal) should be in possession of the pergunna in dispute, and that all the costs of Court should be charged to the plaintiff.

From this decree, the respondent presented an appeal to the Sudder Dewanny Court at Calcutta, and on the hearing by Mr. Rattray, on the 26th March, 1833, it was adjudged that the decision of the Provincial Court was, in every respect, just and proper. The exceptions of the plaintiff (the now respondent) were held to be vain, his claim and appeal were dismissed, and the decision of the Provincial Court was affirmed.

After this, the respondent presented a petition for review of judgment, and the petition having been granted, the cause was again heard by Mr. Rattray, on the 21st August 1838; the respondent then produced several additional documents, and it was held by Mr. Rattray that the documents produced by the plaintiff proved his claim, and thereupon Mr. Rattray decreed that his former decision should be reversed; but the concurrence of another Judge being necessary under the circumstances, he ordered the papers to be laid before another Judge to pass a final order.

The case was afterwards brought before Mr. Abercrombie Dick, another Judge of the Sudder Dewanny Court at Calcutta, and on the 2nd December 1839 he held

that the claim of the plaintiff ought not to be admitted, and that decision of the Provincial Court and the first decision of Mr. Rattray should be affirmed; and in consequence of this difference of opinion, it was ordered that the papers should be laid before another Judge to pass a final order.

Under these circumstances, the case was again heard before Mr. Edward Lee Warner, who concurred with Mr. Rattray in the opinion recorded by him on the 21st August 1838, and differed from Mr. Dick in his opinion recorded on the 2nd December 1839, and finally ordered that the claim and appeal of the plaintiff should be decreed, that the former decree of the Sudder Dewanny Court, dated the 26th March 1833, which affirmed the decision of the Calcutta Provincial Court, should be reversed, and that the plaintiff should be put into possession of the property in dispute and the costs of the Court. It is from this decree that the present appeal to Her Majesty in Council is presented by Anund Lal, the defendant in the cause below, and now the Appellant.

It appears that the family of Narayun Deo had, in some way, had possession of the Rajaship and zemindary of Pacheet for several generations, and that for several years before the year 1769 the possession had been the subject of great and violent contention, amounting to actual war between different members of the family. Muni Lal was the eldest son of the eldest branch. He had two uncles, Mohun Lal, and Kunchun Lal; Mohun Lal had possession of, and claimed to be entitled to part of the zemindary, or to part of the lands comprised in the zemindary. Upon his death, in 1769, his brother Kunchun Lal became possessed of such part of the zemindary or lands as had been possessed by Mohun Lal; and in 1770, Muni Lal, as Zemindar, complained to the Council of Revenue of Moorshedabad that he had been forcibly dispossessed of his zemindary; that, after expelling one member of his family, he had got possession of part of the raj and zemindary, but that Mohun Lal had also a part; and after his death Kunchun Lal had been in possession of some pergunnas of the zemindary, and intended taking more. He stated that, by the ancient custom of the family for many generations, after the death of the Raja, the eldest son succeeded him, and the other sons had a maintenance for life, and that the zemindary was never divided. He therefore prayed that the family usage of the zemindary might be enquired into, and that he might be ordered to be put into possession of the whole zemindary.

In consequence of this complaint and request, an enquiry was instituted and a report made; and in the result on the 7th March 1771, the Council of Revenue concluded, or came to the determination, that the succession to the whole zemindary devolved, by inheritance, to the Raja Muni Lal, and that Kunchun Lal (his uncle) ought to have a reasonable and equitable allowance for his subsistence, which, in right of his being descended from a junior branch of the family, was secured to him by a clause in the sunnud. The Naib Dewan's perwanna of investiture was obtained, and sent to Mr. Higginson, the supervisor of Pacheet, who was desired to instal Muni Lal in the zemindary, and in May, 1771, Mr. Higginson accordingly installed him in the whole zemindary, and delivered to him the Nawab's perwanna and the customary khibats on the occasion; Kunchun Lal, on hearing that he was deprived of his share of the zemindary, which he had possessed (which Mr. Higginson calls the half of the zemindary), retired to Ramgur, and was invited to return, with a promise of protection and of the enjoyment of a monthly allowance for himself. With this he does not appear to have been at first contented, for on the 15th June 1772, he complained (by his Vakeel) that he had been supplanted in his division of the zemindary, and he prayed that he might be restored to his zemindary. He was answered that, if he would return to Pacheet, an equitable and reasonable allowance would be granted to him for his subsistence, as was due to him by a clause in the sunnud.

Soon after this, Bahadur Sing, the only son of Kunchun Lal, died in August 1773; Kunchun Lal adopted as his son Sutroghun Sing (the second son of the Raja

Muni Lal), and committed to him (what is called) the whole property during the life and after the death of Kunchun Lal.

No contemporaneous instrument executed by Muni Lal is produced, but the pergunna of Kasaepar being within a part of the zemindary of Pachet, some arrangement was entered into between Muni Lal and Kunchun Lal, and a deed is produced, dated the 26th July 1775, by which Muni Lal is alleged to have agreed as follows:—"As my uncle, Kunchun Lal, has relinquished his half of the raj, and "come to terms with me, I have given the pergunna of Kasaepar to him; and as "he has no son, he has asked me to give him Mudhun Lal" (another name for Sutroghun Sing), "whom he would adopt and keep as his son; I have therefore, "according to the request of my uncle, given him Mudhun Lal in the presence of" [the persons named in the deed]; "in whose presence he has given the entire "Pergunna and all his property to Mudhun Lal, and also has given the pergunna "and entire property of my uncle to Mudhun Lal."

The question in this case depends entirely on the title which Kunchun Lal had or obtained to the pergunna of Kasaepar.

The appellant alleges that the Raja had a right to alienate any part of the zemindary, and that Kunchun Lal, even if he had no previous right to Kasaepar, acquired a right to it by the deed of the 26th July 1775, and that the circumstances under which Kunchun Lal had possessed a portion of the zemindary were such that the relinquishment of his claim to it was a sufficient consideration, if any consideration were required, for the grant to him of the pergunna of Kasaepar.

The respondent, on the other hand, contends that the zemindary was indivisible or inalienable, and consequently, that Muni Lal was incapable, for any consideration, to transfer any portion of it to Kunchun Lal, so as to bind his successor in the zemindary. He further insists that Muni Lal did not attempt to make an absolute gift of Kasaepar to Kunchun Lal, but gave it to him only for the maintenance, or part of the maintenance, to which he was entitled from the Raja, and that the gift (being only for maintenance) could have no binding effect against the successor of the Raja.

The appellant admits that a grant for maintenance ceases with the life of the grantor, and he relies on the power of the Raja to alienate, and the actual alienation which he says was made, and under these circumstances the title of the respondent fails: first, if the Raja was incapable of alienating any part of the zemindary; or, secondly, if the grant of Kasaepar was for maintenance. And as it appears to us that the inalienability of the zemindary has not been sufficiently established, it is necessary for us to consider whether, or not, the grant of Muni Lal of Kasaepar to Kunchun Lal was for maintenance. If it was, the appellant has no title to it.

We consider that, by the proceedings in 1770 and 1771, from which Kunchun Lal in vain attempted to obtain relief in 1772, it was clearly established that Muni Lal, was entitled by inheritance to the whole zemindary, and that his uncle, Kunchun Lal, was entitled to an equitable and reasonable allowance to be granted to him for his subsistence. It was in this state of their respective rights, that the transaction of 1773, or of 1773 and 1775, took place. It may be questionable whether the deed of the 26th July 1775 is genuine: but supposing it to be so, Muni Lal thereby gave the pergunna of Kasaepar to Kunchun Lal, without making any mention of maintenance; and the circumstances of the case were such that there might have been an intention to give more than maintenance, and that for valuable consideration. Nevertheless, there is nothing in the deed to prove that in this gift of the pergunna of Kasaepar more than a provision for maintenance was intended; and documents of a subsequent date appear to us to show satisfactorily that no more was intended.

Kunchun Lal died about 1781, and was succeeded by his adopted son, Sutroghun Lal, the second son of Muni Lal. Muni Lal died in 1792, and was

succeeded in the zemindary by his eldest son, Bhurut Sikhur. If the grant of Kasaepar to Kunchun Lal had been a valid permanent grant, Sutroghun Lal was entitled to it without any re-grant or confirmation by Bhurut Sikhur. But on the 7th of May, 1797, as he says, without having seen the former deed, Bhurut Sikhur executed a new deed, authorizing Sutroghun Lal to possess Kasaepar, according to the former deeds. This deed is quite consistent with the supposition that the former deed was a grant for maintenance, but inconsistent with the supposition that the former deed was absolute.

We do not think that the least credit is due to the deed of contemporaneous date alleged to have been executed by Sutroghun to Bhurut.

It appears, by the report of Mr. Vanderhayden (in January, 1799), that the country was in a very unsettled state; that Bhurut Sikhur was in very great pecuniary difficulties, and proceedings were adopted to set aside sales which were supposed to have been improperly obtained from him; and some disputes were subsisting between Sutroghun and Bhurut, respecting the payment of so much of the revenue of the zemindary as was due from Sutroghun in respect of Kasaepar, part of the lands within the zemindary, to Bhurut, by whom the revenue of the whole zemindary was payable to Government, and also in respect of a money-allowance for maintenance, which Sutroghun claimed to be due to him from Bhurut; and on the 15th of August 1803 Sutroghun presented a petition to the Government, in which he complained of Bhurut, that he had stopped an allowance in cash made to him by deed; besides which, he (Sutroghun) had the pergunna of Kasaepar for his maintenance, and that Bhurut had made a grant of that pergunna, given for his maintenance, to the son of his eldest son. He alleged further, that he was enjoying Kasaepar as a maintenance from his father and his uncle, Muni Lal and Kunchun, and that the Raja, his brother (Bhurut), when he succeeded to the raj, gave him a deed under his seal and signature, confirming the former deed, and had it registered; yet he was prepared to take the law into his own hands, and eject the petitioner from the pergunna. Upon this petition, Bhurut was ordered to report in twelve days. What was done upon it does not appear; but it seems that Sutroghun was for that time quieted in his possession of Kasaepar, for in November 1804 he presented another petition, in the commencement of which he states that he was well by favour of the Magistrates to whom it was addressed, and that the pergunna of Kasaepar was for his maintenance, and that he had enjoyed it by paying the Government revenue to the Raja annually; and again complaining that the Raja evaded payment of his annual allowance, and also intended to take possession of the pergunna again. This petition was also referred to the Raja to report, and we have no account of what was done upon it; but it seems that Sutroghun not receiving his money allowance from the Raja, neglected to pay to the Raja the contribution due for Kasaepar to the revenue of the zemindary payable by the Raja, and an offer was made to Sutroghun to have Kasaepar excluded from the zemindary, and entered in his own name, if he agreed to it. The dispute was continued, and was explained by a statement of Mr. Impey, the Assistant Collector at Bancoorah, made on the 9th day of April 1810.

Bhurut Sikhur died in 1816, and was succeeded by Chyte Sing, who died in 1819, and was succeeded in the zemindary by the respondent.

Sutroghun Sing died in 1818, and was succeeded by the appellant.

The dispute which subsisted between Bhurut and Sutroghun continued between the respondent and the appellant; and the question, as has been stated, is, whether Sutroghun was entitled to Kasaepar absolutely, or only for his maintenance: and, having regard to the respective claims of Muni Lal and Kunchun Lal in 1770, to the proceedings of the Council of Revenue, the deeds of 1773 and 1775, the confirmation of the grant of 1775 by the deed of 1797, and the distinct statements and admissions made in 1803 and 1804 by Kunchun, we are of opinion that Kunchun Lal was entitled to Kasaepar only for his maintenance, and consequently,

that the Raja (the plaintiff in the cause below and now the respondent) was entitled to recover possession.

We shall, therefore, humbly report to Her Majesty, that the appeal ought to be dismissed, and the decree of the 24th of February 1840 affirmed. But, considering the great length of time during which the appellant continued in possession of the pergunna in question, and the several decisions which have at different times been pronounced in his favour, it appears to us that we may, without impropriety, recommend the dismissal of the appeal without costs.

The 22nd February 1851.

Present :

Lord Langdale, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Gift.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Baboo Kasi Presad Narain,

versus

Mussumat Kawalbasi Kooer.

Where the Court below had decided against the claim of the plaintiff upon a deed of gift, the probabilities (independently of the evidence) being rather against than in favor of it, and no satisfactory account was given of the reasons which caused the postponement of the appeal for at least 12 years, the Privy Council did not think it safe to reverse the judgment of the Lower Court.

The Right Hon'ble T. Pemberton Leigh.—BAHORE NARAIN, whose property is the subject of the present litigation, appears to have died on the 2nd of October 1816. He left a daughter, who, it is now admitted, was his heiress, and two grandsons, children of that daughter: and he appears to have had several nephews. On his death, his daughter, who lived with him, remained in possession of his property.

Some of the nephews attempted to disturb that possession. One of them set up a claim, I think, as Kurta-putra (adopted son) of the deceased; another produced a deed of heirship, in which the title of the two nephews of Sheo-Das Narain, who seems to have been absent, was recognised; and under those different claims they attempted to turn Kawalbasi Kooer, the daughter, out of possession. This led to a dispute in the Foujdary Court, and there it was finally determined, that whatever litigation was to take place must take place in the Civil Court; and that in the meantime the daughter should be left in possession of the property.

In 1817, the plaint in this suit was filed by Sheo-Das, who seems to have been absent at the time when the testator died. After a great many intermediate proceedings, and very great difference of opinion among the Judges in the Court below, finally, in 1823, a decision was pronounced in favour of the present respondent; liberty to appeal was granted; and from that time to 1836, we have no evidence of what took place as regards the prosecution of that order for liberty to appeal. In 1831, I think, the original appellant died. Litigation arose with respect to the heirship, which was completed in 1836, and the order to substitute came over in 1839; and from that time to the present, the delay seems to be sufficiently accounted for by the difficulties which occurred in obtaining copies of the proceedings. But the fact is, that from 1816, when this gentleman died, to the year 1851, in which we are disposing of the question, possession under a judicial title of some sort or other has remained with the respondent; and it certainly would require a strong case to induce a Court of justice to overturn that possession under such circumstances.

We are far from saying that there is not very great difficulty in this case; but the question which we have to consider is, first, whether, the onus lying on the appellant, that is to say, on the person whom the present appellant has succeeded

to establish his case against the heir, we are so satisfied that that case was established in the Court below, that, against the opinions of the Judges, upon a point merely of fact and the value of evidence, we can safely recommend Her Majesty to overturn the judgment.

The case which is set up on the part of the appellant is this :—He says, that on the 27th of December 1809, Bahore Narain having a great regard for him as his nephew, and having no male heir, executed this instrument, and took it, either on the 29th or the 30th of December, to the Kazi to have it attested by his seal, which seems to have very much the effect of a notarial recognition of the instrument. From that time until the period of the grantor's death, no attempt was ever made to alter that instrument. He was absent at Calcutta at the time when the grantor died, and he was sent for ;—he came as soon as he could ;—before he arrived, the grantor had died, and he brought forward this claim as soon as it was possible for him to do so consistently with the circumstances in which he was placed.

With respect to this deed, there is certainly a great deal of evidence not at all more liable to suspicion than all Hindoo testimony unfortunately is, as to its execution at the time at which it is represented to have been executed. With respect to the direct parol testimony upon the point, we can give very little weight to it. It seems to us to be utterly improbable, if not impossible, that two or three officers who were in the habit of putting their seals to instruments very frequently, should recollect in the year 1820 what took place in the year 1809, the conversation which then passed, and the explanation which was then given by the party who brought the deed, as to what the contents of that deed were ; and that they should depose as to all this with a particularity which, if the circumstance had happened only a week before, could hardly in ordinary cases have been expected, unless there were some particular reason or other for its having made so strong an impression upon their minds.

On the other hand there is evidence, probably of very little value, but there is the evidence of parties on the other side, who, if they swear truly, swear that it was impossible that any such deed could have been executed. One set of witnesses swear that the grantor was absent from the place where the deed is said to have been executed at the time of its execution ; another set of witnesses swear that they were called on after the grantor's death to witness this instrument, which was admitted to have been a fabricated instrument. No doubt there is great improbability in the statement of the last set of witnesses, and very little reliance to be placed on the witnesses on the other side.

The peculiarity of the case seems to depend upon that part of the evidence which arises from the Kazi's book ; and certainly, if nothing more had appeared to us, except that that book had been produced, with the signature of the Kazi at the beginning, and the signature of the English Judge at the end, that book appearing to have been regularly kept, and this document entered there, it would have been such evidence as, notwithstanding all the difficulties of the case in other respects, would have induced us to say that we should not recommend Her Majesty to confirm the judgment which had been pronounced. But when we look to the evidence by which that instrument is explained, it appears to us that all or nearly all the value of that testimony is removed. It is said that, by the Regulations of 1793, it was the duty of the Kazis to keep copies of the instruments which they executed ; and it appears to have been so. A witness, however, states that Kazis in that neighbourhood were not aware of that Regulation ; that no orders had been issued to that effect to them, but that that they were in the habit of keeping copies for their own satisfaction. How those books of the Kazis, as they are called, were bound, or in what form they were, does not very clearly appear ; but it seems that at some period, which must have been after March 1818, all the books of the Kazis in that district were called for by the Judge of the Zillah Court ; that they were all sent in to him, and that then those books appear to have been made up into volumes,

and they were directed in future to keep records of these instruments in volumes, and then, those things having been thus divided, and apparently made up for each year, the Kazi and the Judge, one at the beginning and the other at the end of the document, affixed their signatures as an authentication of it.

If this had been done before 1809, no doubt it would have had the greatest possible weight; but not being done till after 1809, and till after this litigation had occurred,—for it is clear it was after March 1818, because the Kazi brought in his book up to March 1818, and this plaint was filed in 1817; the whole value of that evidence appears to us to depend upon this, is there sufficient proof to us that there could be no interpolation of this document in the interval between the year 1816, when it was first mentioned by the parties who produced it, and the period of March 1818, or the subsequent period, whatever it was, at which those records were made up and authenticated in the manner I have stated? We do not think, considering the nature of the testimony given upon that point, that it affords sufficient ground for us to decide against the opinions which have been come to below, there being great discrepancy among the Judges, and perhaps not, upon the whole, very satisfactory reasons given by them.

In the result, therefore, considering that the onus is upon the plaintiff; considering, as some of their Lordships are of opinion, that the probabilities of the case, independently of the evidence, are rather against than in favour of the deed; considering that the Judges of the Court below have decided against the claim of the appellant, and that for at least twelve years we have no satisfactory account of the reasons which occasioned the postponement of this appeal, we think it would not be safe to advise Her Majesty to reverse this judgment. But there is so much doubt upon the case, and there has been so much difference of opinion among the Judges who decided it, that, though we shall recommend the appeal to be dismissed, we shall not think it fit to give any costs against the appellant.

The 18th June 1851.

Present :

Sir J. Jervis, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Succession—Raj of Rawutpore.

On Appeal from the Sulder Dewanny Adawlut at Allahabad.

Rawut Urjun Sing and Rawut Doorjun Sing,

versus

Rawut Ghunsiam Sing.

Held upon the evidence as to the family custom and usage for about 8 generations, that the Raj of Rawutpore was indivisible and descended entire to the eldest son to the exclusion of the other sons.

The Right Hon'ble T. Pemberton Leigh (Chancellor of the Duchy of Cornwall):—MR. WIGRAM.—We do not think it necessary to trouble you. The only question is the question of the family: it does not appear that there is any other question in the case. Then, upon the acts of the party and the nature of the property, the question is, whether this property descends entire, or is divisible. Now, upon that point it is said that it is very possible the party may have the property which is subject to division. It is very true that the circumstances and nature of this property are only material as forming one item in the question of probability whether this is or not divisible property—whether in our opinion it is a raj, and therefore possessing whatever rights belong to property of that character.

By a decree which was made in the year 1812, it is stated distinctly that “as the defendant has held possession of the various villages from the time of his ancestors, and has always borne the title of Rawut (as appears even from the depositions of plaintiff's witnesses, and the potta granted to him, defendant, by the

“former Collector of this Zilla), no doubt exists as to defendant being the proprietor of Mouza Khajoor as well as of chuk Oodey Kurn”

Now, as to the nature of this property, it appears that the father of the present parties unfortunately was troubled with very disobedient sons, who quarrelled among themselves, and that he made different dispositions at different times, first in favour of one, and then in favour of the other, and probably made declarations; but in 1827, he was examined before the acting Magistrate of the Foujdary Court of Cawnpore, and being called upon to state the nature of the dispute existing between himself and his sons, he stated as to this property as follows:—“The fact is, I am personally concerned in no dispute, for as long as I am living, I am the proprietor of my estate; but the custom in my family has been this, through every generation since this estate has come into existence, that the eldest son succeeds to the musnud, and the estate is held by him entire and undivided, and that the subsistence of the other sons is provided for.”

In 1827, it appears that the Magistrate thought it necessary to enquire into the custom with respect to the division of estates of Rajas; they took certificates from four Rajas as to that custom; and the statement made in answer by Raja Dan Sing was, “That in the families of all such Rajas as receive the Kashka (or mark of red ochre on the forehead), and sit on guddies, the estate is not divided into shares, but that it is customary for the eldest son to succeed his father in the guddy—after that they continue subject to his authority; and that such has been the custom in your petitioner’s family from ancient times.” Statements to the same effect were sent from the three other Rajas.

In addition to this, we have the pedigree of this particular family, taking it up from the time of Rawut Kheem Kurn. It appears that there had been, I think, eight descents; and in three or four at least of these there having been more than one son, the property had not been divided between those sons. One a very remarkable case, is this, that Rawut Kurn Rai having adopted a son, that son proceeded to deal with the property as an undivided estate, and excluded an after-born natural son of Rawut Kurn Rai. There are other cases in which, if there had been the liability to division, that division might have taken place.

Then it is said, that it appears that at the time of Bikramajeet, there was a division of a portion of this raj, and that it was divided between two sons of Bikramajeet,—Khurg Rai, who was adopted by Kurn Rai, and Gunnessh Rai, who was the next son of Bikramajeet. Now with respect to that, it is necessary to make out that the property which was then the subject of division was the raj of Rawutpore. I cannot find that there is any evidence at all to that effect,—all the presumption is to the contrary, because Khurg Rai would have been in possession, at all events, of half of that raj; and the property stated is not the raj of Rawutpore, but the zemindary of Bikramajeet. Now, that portion of the zemindary has remained, it appears, exempted: if it had been part of Rawutpore, it would have been subject to the same state of things.

Under these circumstances, therefore, the judgment will be affirmed, and of course in the usual way, with costs.

The 21st June 1851.

Present :

Sir J. Jervis, Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Nuncupative will (by a Mahomedan of rank).

On Appeal from the Sudder Dewanny Adawlut at Allahabad.

Nawab Amin-ood-Dowlah and others,

versus

Syud Roshun Ali Khan and Fatima Begum.

In this case the Privy Council, looking at the probabilities, declined to reverse a decision of two Courts in India upon a question of mere fact as to the making of a nuncupative will by a Mahomedan of rank.

The Right Hon'ble Thomas Pemberton Leiyh (Chancellor of the Duchy of Cornwall).—In this case we are called on to reverse the decisions of two Courts in India upon a question of mere fact. It is said by Mr. Forsyth, and I have no doubt with perfect truth, that those Judges did not see the witnesses; and therefore, he says, they had no better means of judging of the credit due to them than the Judges of this Court have. It may be very true that they did not see the witnesses, but the Judge of the Zilla Court was resident on the spot. He knew the nature of the question which was in dispute. He knew the probabilities which were likely to arise in a great family like this, and the description of the different witnesses who were brought to give their testimony; at all events, the Court below had as good, and we think a better, means of judging of the credit due to the testimony than we could possibly have.

Looking at the probabilities of the case, the circumstances seem to be pretty strong in favour of the decree which has been made. Here is a man of high rank and station, with a very large income, who has a number of connections and dependents upon him, to whom, it is beyond dispute, he was in the habit of making certain allowances for their maintenance; and though it was very possible that those allowances, like payments made by some other parties, were not very regularly paid, or were in arrear, yet there is nothing to show that he had ever intended to withdraw his bounty from those parties. The probability rather seems to be, that he would not leave his connections, some of them female connections, who had been, up to that time, dependent upon his bounty, wholly without provision under his will.

In this state of probability we have the evidence of a number of witnesses, all speaking to the fact of a nuncupative will to this effect having been made. The answer to that is, in the first place, the production of six or seven witnesses. The first batch of witnesses, if I may so call them, are all slave girls, and the effect of their evidence is, that this nobleman, during this period, that is to say, taking ill the very day on which the will is represented to have been made, became speechless upon that very day, and continued to be speechless up to his death, and therefore he could not have made this will.

In answer to that, we have the evidence of a physician, a person who gives his evidence apparently with great impartiality. I forget his name at this moment—He says he attended him, and so far from his being insensible, up to the day of his death, he was perfectly sensible; and so far from being speechless, he conversed during the time he saw him, and was in perfect possession of his mental faculties.

With respect to the character of the witnesses on both sides, I believe there is not a single witness on the part of the appellants who is not either in the character of a slave, having lived in the family before the death of the testator, or a person in the service of the Appellant. The whole effect of the evidence given against the will is, that those persons had none of them heard the will, and

that they alleged that the testator was not, during this period, in a situation to make it. On the other hand, some of the witnesses on behalf of the respondents are of a very much superior class. It is true that one of them is a member of the family, the son of one of the legatees—another is a physician—another is an officer in the Zilla Court, described to be a moonsiff, who, we understood from Sir Edward Ryan, is a person holding a respectable situation in that Court.

Thus the case stands upon the parol testimony, but when we come to the documentary evidence, the preponderance seems to us to be entirely in favour of the respondents. Mr. Forsyth endeavours to get rid of the effect of a letter of the only party who is represented to have any real interest in the matter, the Nawab himself, by observations tending, as he contends, to show that it was not likely that such a letter should have been written. Let us see how that matter stands. This plaint was filed on the 12th of March 1835. In that very plaint it is alleged, that thereafter "plaintiffs demanded payment of their allowances, "as settled by the deceased Nawab, from his heirs who were in possession of his "estate; whereupon Nawab Amin-ood-Dowlah Bahadur, the eldest son of the "Nawab, in a letter to the address of the plaintiffs, acknowledging that the "deceased Nawab had declared his will to the effect that plaintiffs' allowances "should continue to be paid to them, promised to pay the same on receiving the "stipend from Government." It is quite impossible to suppose that this letter, whether forged or not forged, was not in existence at the time that this statement of the contents of that letter was made. Then as to the letter itself, how does it stand? You have, in the first place, the evidence of a party uncontradicted and not open to any observation in cross-examination, who swears that he wrote that letter, that he wrote it by the direction of the Nawab, and that the Nawab put his seal to it in his presence.

An enquiry was directed by the Court, with respect to the genuineness of that letter, and the Judge of that Court, in page 170, after the examination, states the grounds on which his opinion is formed. The objector to this letter had been called on to state whether he could suggest any ground on which the genuineness of the seal could be doubted, whether "he could point out any indications of fabrication." The Judge says, "There is no evidence to show that the seal of Nawab "Amin-ood-Dowlah was ever in the custody of the plaintiffs;" and after going through the matter at some length, he says, "Considering all these facts, it is "clearly proved to my mind that the letter was written and sent by Nawab "Amin-ood-Dowla."

But it does not rest even here, because there is a portion of the evidence of Hakim which very much confirms it. He does not seem to have the smallest bias in favour of the one side or the other. He is asked, "Do you know whether, on "the said Thursday, the Nawab declared any will in favour of any person?" He says, "He did not declare his will in my presence. If he made known his will in "the female company I cannot say, but I did indeed hear talk that the Nawab, "despairing of his life, is declaring his will. He declared some will, but I do not "know what will he declared, nor in whose favour." And then he adds, "Nawab "Amin-ood-Dowlah also acknowledged that the Nawab had declared his will."

In addition to this, there is the testimony of several persons who were present on the occasion, who do not speak to what the contents of the will were, but who speak to what happened on this particular occasion on which they were present. Some disturbance and noise, they say, took place in the room in which this nobleman was, and then parties came out in a state of agitation, who stated that the Nawab was declaring his will, and stating also what the effect was.

Against all this testimony there is nothing except that which, unfortunately, we know to be of very little value in Indian cases, the depositions of a great many persons, servants and dependants upon a great man, all of whom, in nearly the same

words (as respects the two classes of witnesses it is in the same words), speak to some facts which are contradicted by those whose testimony appears to us much less open to imputation.

We cannot think, therefore, that it would be of any use to investigate this case further. We have heard all the arguments which have been addressed to us with great ability, as they always are, by the Counsel who have argued this case for the appellants, but they have not raised sufficient doubt in our minds to make us feel it necessary to call upon the respondents for an answer. We shall therefore affirm the decision below with costs.

The 5th February 1852.

Present :

Dr. Lushington, T. P. Leigh, and Sir E. Ryan.

Mortgage—Sale—Supplemental Plaint (Section 5 Regulation IV. 1793).

On Appeal from the Sudder Dewanny Adawlut at Allahabad.

J. R. Douglas, attorney for Government, acting as Executor of the will of Jykishen

Das, deceased,

versus

The Collector of Benares and others.

A person, having an equitable mortgage in certain villages of which the legal title was in the mortgagee's son, instituted a suit against the mortgagor to recover the amount of his demand. Pending the suit, and while the son, the representative of the mortgagor, was a party to it, the Collector, sold the property as if it were the son's unincumbered estate, suppressing all mention of the mortgage (of which, he had notice) in the advertisement of sale, conveyed away the estate to the purchaser as unincumbered, and received the full value as if it were free from mortgage,—**Held** that the Collector was liable to repay the amount which had been realized by the sale.

The leave to file a supplemental answer given under Section 5 Regulation IV. 1793 did not warrant the defendant to make a totally new case, and state facts at direct variance with the statement in the first answer, and completely change the issue in the cause.

The Right Hon'ble T. Pemberton Leigh, Chancellor of the Duchy of Cornwall.—In the month of September, 1811, Sheikh Shookr-oollah had transactions in business with a mercantile firm, of which Jykishen Das was the representative, and he became indebted to the firm on a balance of accounts. He was, or represented himself to be, the owner of two villages, and a fourth share in another village purchased with his own funds in the name of his son Gholam Ahmud; the property appears to have been held under a grant at a light rent (called a *maafee sunud*) from Raja Bulwunt Sing to Gholam Ahmud.

On the 4th September 1811, as a security for the balance then due to Jykishen Das, Shookr-oollah handed over to him the *maafee sunud* under which the property was held, with two other papers relating to it, the particulars of which are not stated, and granted a mortgage bond, which, after stating the balance due, was in these terms: "In consideration of the said sum [Rs. 23,645, 2a.] I pledge the "villages of Lehurtara, Cheetoo-poor, and a fourth share in Jaitpoora, purchased "with my own funds in the name of my son Gholam Ahmud, together with three "papers, *viz.*, one a *maafee sunud*, bearing the signature of Raja Bulwunt Sing, and "two others, *viz.*, one an original deed, and the other a copy, till the sum be paid. "I promise to pay the said sum in three years, when I shall receive back the "papers. Should the term expire and the debt not be paid, then I will mortgage "or sell the said villages elsewhere, and pay the money due to the house."

The debt not having been paid at the prescribed period (three years from the date of the security), Jykishen Das took possession of the mortgaged property, and remained for several years in possession. On the 21st July 1819, a large balance remaining due to him, he filed a plaint in the Provincial Court of Benares, the terms of which are not in evidence, but from the final decree made in the suit, it

appears that the plaintiff set forth his bond, alleging that the debt remained unpaid, and sought justice. It would seem therefore to have been a prayer for what in a Court of Equity in England would be called general relief, or such relief as the circumstances established at the hearing might, in the opinion of the Court, entitle the plaintiff to call for. That relief would be, if the case were established, a personal decree against Shookr-oollah, if alive, or against his assets if he were dead, and a sale or mortgage of the specific property pledged to satisfy the demand.

To this plaint, Shookr-oollah put in an answer, not suggesting that the property in question belonged to his son, but denying the bond and the debt to the plaintiff; admitting that he had deposited with the plaintiff the title deeds of the property, but alleging that the deposit had been made by way of suretyship for a third person, from whom nothing was due to the plaintiff.

Now it must be admitted that the answer of Shookr-oollah would be no evidence against Gholam Ahmud, unless it had in fact been put in, as the plaintiff in his replication alleges, by Gholam Ahmud himself under his father's seal; but of this there is no evidence. However, after an answer had been put in, and before replication, Shookr-oollah died, leaving Gholam Ahmud his son and heir, and as such his representative in the suit; and by the proceedings recited in the decree, it appears in the Appendix, page 23, that on a petition being filed by the plaintiff representing that the defendant had deceased, and praying that a notification might issue calling on his son Gholam Ahmud to appear, an order for the issue of this notification was passed on the 16th of May 1821.

Gholam Ahmud therefore at that time, if not sooner, had plainly notice of the suit; he became a party competent to assert all rights which he had, either in his individual or representative capacity. According to the practice of Courts of Equity in England, he ought to have been originally a party as having what we should term the legal estate, but if there was any informality in not making him a party at first, all substantial objection was removed when he was brought before the Court at a period of the suit which enabled him to bring forward any claim which he had seeing the answer which had been put in by his father, which answer dealt with the property as belonging to the father, the son makes no complaint of it, and when a replication is filed respecting the plaintiff's title, a rejoinder was called for, and we presume filed, but no title appears at any time to have been set up by Gholam Ahmud in himself.

The cause did not come on for hearing until the 12th of August 1825, when this bond appearing to have been executed on an insufficient stamp, the Judge of the Provincial Court, instead of giving the plaintiff an opportunity of applying to the Revenue Officers to affix the proper stamp, which was afterwards done, or proceeding, as he was pressed to do, to take evidence of the debt due, which with the deposit of title deeds might have established the plaintiff's demand, very improperly dismissed the suit with costs.

Against this decree an appeal was, with great reason, brought to the Sudder Adawlut of Allahabad; the precise period does not appear, but we collect from what afterwards took place, that the appeal must have been lodged very shortly after the decree. The cause came before the Sudder Court on the 10th of December 1828, when the Court directed enquiries to be made and evidence to be taken with reference to the accounts and the facts of the case, independently of the bond, which, for want of a proper stamp, could not be received in evidence. A great many witnesses were examined, and much evidence was taken, and on the 11th of February 1835, the cause came on for hearing before Mr. Colvin, one of the Judges of the Sudder Court.

Amongst other evidence then produced was an amal-dastak from Gholam Ahmud to the tenants of the estate, directing them to pay their rents to the Plaintiff, the mortgagee. Is it possible that there could be stronger evidence in favor of the plaintiff's claim under the mortgage, or more conclusive proof that Gholam Ahmud could set up no title in himself in opposition to it?

Mr. Colvin was of opinion, most properly, that the decree of the Court of Benares should be received, and stated his view of the case in these terms :—" Although the bond has not been executed on a stamp of 8 rupees, as required by Regulation VII. of 1800, but has been written on a stamp of only 8 annas, and is consequently inadmissible in a Court of Justice ; but the claim of plaintiff, appellant, was brought into Court under the ledger accounts as well as under the bond, and, from the evidence of the witnesses, the report of the treasurer, and the translates of the account-books elicited in the enquiry, as far as it has been prosecuted in pursuance of the order of the Sudder Dewanny Adawlut of Calcutta, dated the 10th December 1828, viewed in connection with the answer to the plaint filed by respondent's ancestor, in which he acknowledges that he was security to the house for Meer Ussud Ali, the tahsildar ; that he delivered the title deeds to plaintiff for his satisfaction ; that the amal-dastak was drawn out in plaintiff's name by Sheikh Gholam Ahmud his son : and from a reference to the amal-dastak, bearing respondent's seal, which has been filed by Appellant, the claim of plaintiff, appellant, under the ledger account, of the fidelity of which there is not the least doubt, is fully proved and established, in my opinion, to the satisfaction of the Court ; under these circumstances the claim and appeal of appellant should be decided in his favour, and the decision of the Provincial Courts should be set aside, and with this view of the case no further enquiry is deemed necessary." The Judge here relies upon the deposit of the deeds and the amal-dastak as part of the evidence establishing the plaintiff's demand. Now unless the demand was against the particular estate, the deposit and the amal-dastak were of no importance, he therefore manifestly considered the claim as established against the property.

As the decree of the inferior Court was to be reversed, it became necessary that the case should be laid before another Judge of the Sudder Court, and accordingly, in the end of March 1835, the case came before Mr. Turnbull, who directed application to be made by the plaintiff to the revenue authorities to have the defect in the stamp on the mortgaged bond remedied. This was done, and the application having been granted, the case was brought again before Mr. Turnbull, who pronounced his decree on the 15th June 1835, in these terms :—"Adverting to the reasons given in the proceeding of the aforesaid Judge, and the papers in the suit, I am also of opinion that the claim of the plaintiff has been satisfactorily proved. Accordingly a final decree is passed that the appeal of appellant be decreed to him, the decision of the Provincial Court of Benares, dated 12th August 1825, be reversed and set aside, that the whole of the costs of the two Courts be paid by respondent, and that suing out execution of the decree, plaintiff do recover the amount claimed, with interest thereon at the rate of one rupee per cent. per mensem from the date of institution of suit to the date of payment, together with the costs, from the estate and effects of Sheikh Shookr-oollah, deceased, the ancestor of respondent."

It will be observed that this decree does not direct payment out of the specific property charged, which may perhaps be accounted for by circumstances which we shall presently advert to ; but that the claim was considered established and intended to be satisfied out of that property as part of the assets of Shookr-oollah and as specifically charged, there cannot be the smallest doubt, from the terms of the decree of the two Judges to which we have referred. The first Judge distinctly states, as proved, the deposit of the title deeds and the amal-dastak of Gholam Ahmud, and the second Judge adverts to and concurs in the reasons of the first, and receives the mortgage bond in evidence. It is plain, therefore, that the Plaintiff's case was held to be established, and the mortgaged property treated as the property of Shookr-oollah. It would have been extraordinary if it had been otherwise ; the only person who could set up an adverse title, Gholam Ahmud, had been for thirteen years before the Court, a party in the suit litigating and resisting the

Plaintiff's right on other grounds, but had never set up what, as regarded the mortgage, would have been a conclusive answer, an adverse title in himself.

Unfortunately, however, in the interval between the dismissal of the suit and the final decree on appeal, transactions had taken place which brought the plaintiff into conflict with a more formidable antagonist than Gholam Ahmud or Shookr-oollah, and prevented him from reaping the fruit of his decree. It seems that previously to 1825, Gholam Ahmud had taken to farm some part of the Government revenue, and in that character had become a defaulter and a debtor to the Government, and the Collector of Benares thought fit, in 1825, or early in 1826, to seize the villages, the subject of the Plaintiff's mortgage, and to take steps for bringing them to a sale, in order to satisfy the demand against Gholam Ahmud. The villages having become the property of Gholam Ahmud, as heir of his father, subject to his father's debts, would, of course, to the extent of Gholam Ahmud's interest, be liable to any demands against him, but in what mode this particular liability to the Government had been created, is a question involved in much obscurity, for two totally different and inconsistent accounts have been given by the Collector, as will presently appear.

Jykishen Das hereupon, whose suit had indeed been dismissed in the inferior Court, but who had appealed or was about to appeal to the Sudder Court, presented (as he alleges, and, as we think, for the reasons we shall state, he has sufficiently proved) a memorial to the Collector, stating his claim, and praying that the sale might be stayed. No attention being paid to this memorial, he petitioned the Provincial Court of Benares to interfere. Nothing effectual having been done by that Court, the plaintiff finally applied to the Sudder Court of Calcutta. At what time the petition was presented does not appear, but it came before the Judge, Mr. Courtney Smith, on the 18th of April 1827. It was not known in Calcutta at the time whether the sale had been actually made or not. In point of fact, the principal portion of the property had been sold in November 1826. The Judge of the Sudder Court, therefore, made this order: "The petition of appellant complaining of the Collector's proceedings touching the sale of certain villages mortgaged to Appellant, and praying that an order may issue prohibiting the sale, or directing the proceeds of the auction sale to be held in deposit until a final decision should be passed by this Court, and setting forth other matters; also copies of two proceedings of the Provincial Court of Benares, dated respectively the 28th April 1826, and 10th February of the current year; also copies of two petitions on the part of Bhowanideen, which were filed in this Court on the 14th of the current, accompanied by the prescribed stamp, and which are numbered 13, 14, 15, 16 and 17, were this day perused. As the sale has taken place, or is about to take place, for a claim of Government in the akbari mahal, an order prohibiting the sale or directing the sale proceeds which are not in excess of the Government demand to be held in deposit cannot issue from the miscellaneous department. If there be a surplus of the sale proceeds, the Provincial Court are competent to issue the necessary orders; there is consequently no necessity for an order of this Court. Should the decision of the Provincial Court be eventually reversed, and Appellant's claim be decreed to him by this Court, and appellant consider that his claim to the lands sold is stronger than the claim of Government, he will be competent to bring a regular suit against Government."

The learned Judge appears to have thought, and in our opinion to have justly thought, that if the Collector, with full notice of the plaintiff's equitable claim, thought fit to sell the estates as the property of Gholam Ahmud, in whose name they were held, without noticing the plaintiff's claim, the plaintiff would have a clear equity against the proceeds in the hands of the Collector, if his claim should be ultimately established, and this, upon the most obvious principles of moral justice, recognised and acted on as safe grounds of decision by the Court of Chancery in England.

When the plaintiff's claim was ultimately established he himself was dead; he had made a will appointing the Government his executor; his will was disputed, and it was not until the year 1838 that the Will was established; and on the 5th November 1838, the plaint in the present suit was filed in the Court of Benares; the suit was instituted against the Collector of Benares, as having received the proceeds out of which the plaintiff's demand was to be satisfied against Gholam Ahmud and his mother Lado Begum (the widow of Shookr-oollah and mother of Gholam), and against several other defendants who had purchased the estates at the sale made by the Collector. The reason for making Gholam Ahmud's mother a party was this: The plaintiff alleged that Gholam Ahmud being required to give security as farmer of the revenue, forged a deed of dower in the name of his father Shookr-oollah in favour of Lado Begum, and that Lado Begum and Gholam Ahmud then joined in pledging the estates to the Collector for due payments of anything which might become due from Gholam Ahmud. The plaint, taking this view of the Collector's claim, alleged various reasons to show that the pretended deed of dower was fictitious, and that Lado Begum never had any claim to the property, and it charged the Collector with having omitted to make the necessary enquiries and to take proper precautions before he accepted the security. It alleged distinctly the proceedings on the former suit; that application had been made to the Collector to stay the sale till the plaintiff's claim was formally disposed of; that application had afterwards been made to the Court of Benares, and finally to the Sudder Court of Calcutta, with such effect as we have already stated. The relief sought was to this effect:—"That although this sale is "in every sense open to reversal by a Court of Equity, yet on consideration that "after the reversal of the sale the said property must still be sold in satisfaction of "the claim under the Sudder decree, and plaintiff would receive the proceeds, and "that double trouble will be incurred, plaintiff therefore, relinquishing his claim for "reversal of sale, and holding that he is entitled to the sale proceeds, on the ground "that it was pledged in mortgage for his dues, as declared by the Sudder decree, "has filed his petition for the claim before mentioned, on stamp paper of the value "of 1,000 rupees, under the power delegated to him by the power of attorney in his "name, and prays for a decree, that as usual justice may be obtained by the "institution of this suit."

Though the plaint was filed in November 1838, no answer was put in by the Collector till May 1840. Whether he was the same individual who had been engaged in the transactions with Gholam Ahmud does not appear. It is to be hoped that he was not; but the transactions referred to had all taken place in his office, and memorials of them were or ought to have been found there, and he had had abundant time to inform himself of the particulars. The answer of the Collector began in these words: "That Shookr-oollah, father of Sheikh Gholam "Ahmud, one of the defendants, during his life-time, and after him his widow, "held possession of the villages in maafee, in the name of Gholam Ahmud, their "son. That Sheikh Gholam Ahmud took the farm of the akbari mahal of "Zillah Benares, and gave these three villages as security on the part of his "mother, and caused a security-bond to be executed by his mother. That mother "and son joined interests for their joint profit. That a balance fell due from the "akbari mehal, and the property aforesaid was sold by auction in 1226 and 1227 "Fusli, in satisfaction of the balance due to Government, the usual notification "having first been issued; that the balance was not liquidated thereby." The answer then stated that Shookr-oollah had other property, and insisted that, in the decree of 1835, no mention is made of these villages. The statement here is, that the villages though held in the name of Gholam Ahmud were in fact the property Shookr-oollah, and that the claim of the Government upon them was founded on a deed executed by his widow.

The defendants, the purchasers, put in distinct answers. The Rajah Narain Sing, one of them, insisted that the sales had been publicly made by the Collector,

who had received the purchase-money, and given each purchaser a deed of sale and possession, and that each purchaser got possession of his purchase. The two other purchasers, Rai Sri Kishen and Rai Ram Kishen, insisted that the suit was contrary to the practice of the Court. "That the plaintiff does not sue for the reversal of the sale and possession of the villages, for the plaintiff is clearly satisfied with the sale, and therefore he has not sued for its reversal, but to recover from Government the amount proceeds of the auction which have been paid into the treasury of the Benares Collectorate, together with interest thereon." That, under those circumstances, these defendants were improperly made parties to the suit.

A most conclusive replication to the answer of the Collector was filed by the plaintiff on the 26th of June 1840. After showing that the Collector had in truth admitted the plaintiff's title, it insisted that if the Collector, when he took the security on these villages, had made due enquiry, or called for the title deeds, he would not have been misled with respect to the charge upon the property. It then proceeded to refer to the petitions which had been presented to stay the sale, and proposed to produce them in proof. We shall state the passage, because it is most material both with reference to the merits of the case and the extraordinary proceeding afterwards adopted by the Court. "Eighthly, that when it was discovered that Lado Begum's security was the consequence of Gholam Ahmud's fraudulent conduct, and a petition was filed in the Collector's office, even then the Collector did not abstain from the sale. That plaintiff will file copy of that petition also. "Ninthly, that when the Collector advertized the villages aforesaid for auction sale, then also a petition was filed, and another petition was given in to the Provincial Court. That the order of the Provincial Court was to the effect that, when the time of sale should arrive, the necessary order would be given; but in the interim, Plaintiff's suit was dismissed. That Plaintiff again petitioned the Collector, stating that he had appealed his suit to the Sudder Dewanny Adawlut; that his action against the property was pending; that the property was in mortgage, and prayed that it should not be brought to sale. That thereupon the Collector passed an order in effect, that the plaintiff's suit having been dismissed, no order could issue. That since plaintiff had without ceasing petitioned the Provincial Court and the Collector, pleading his regular suit, and complained of the security and Gholam Ahmud, it was nowise right that the security should have been accepted, the property sold, and the sale proceeds of the mortgage property appropriated; indeed, these acts were beyond the competence of the Collector." The plaintiff here refers to petitions presented to the Collector to stay the sale, one before and one after the dismissal of his suit, and to an order made by the Collector, upon the latter; these, therefore, were documents in the Collector's own office, and a copy of one of them the plaintiff offered to file in evidence.

To the answer of the other defendants, the plaintiff also filed a replication, insisting that they had either notice of his title or had purchased without due enquiry.

On the 3rd of August 1840, the Rajah Narain Sing filed a rejoinder, insisting that he had no notice, and had been guilty of no laches; and on the 15th of August 1840, the other purchasers filed a rejoinder, insisting that the proper course for the plaintiff to have pursued would have been, if he had disputed the sale, to take proceedings to reverse them, in which case the purchasers would have obtained back their purchase-money from the Government; but that as the plaintiff distinctly offered to confirm the sales, he ought to confine his claim to the proceeds and not to sue the purchasers and the Collector at the same time.

The plaintiff seems to have felt the force of this reasoning, for, at a subsequent period, he dismissed these defendants from the suit. The exact date of this proceeding does not appear. We mention it now, in order not to embarrass the statement of the case as against the material defendants. Had the suit gone to

hearing on the issue tendered by the answer of the Collector, there could have been no doubt about the result ; but instead of this, the Court took what appears to us a very extraordinary course. On the 4th of August, 1840 the suit (in which it is stated in the proceeding referred to, "the evidence was called for") was brought up in the presence of the vakeels of the parties. No rejoinder had been filed by the Government vakeel, and as against him the only material party, the cause seems not to have been at issue. On this occasion several questions were put by the Court to the plaintiff's vakeel, as to the year in which his client got possession of the mortgaged property, and the year in which he was dispossessed of it, and other matters. We are at a loss to understand the object of these questions. The vakeel not being prepared at the moment to answer them, the cause was adjourned for two days.

On the 6th of August, accordingly, the cause appears to have come on again, when the Government Vakeel is said to "have represented that in the answer which he had before given in to the plaint many facts relating to the transaction had inadvertently been omitted ;" and he asked the Court's permission to file a supplemental answer, which was granted by the Court, and on the 2nd November 1840, the answer having been prepared, an order was made by the Court "that it be filed, and that the cause be again brought up after eight days or more."

The answer which was filed was by no means confined to stating facts relating to the transaction which had been inadvertently omitted. It was in utter contradiction of the statements which had been made in the first answer. Instead of alleging that the property had belonged to Shookr-oollah and his widow, it alleged that it had never belonged to Shookr-oollah or his widow, but that it was always the property of Gholam Ahmud. Instead of relying as before on a mortgage by the widow and Gholam Ahmud, it alleged that no mortgage of it had been made by either of them, but that Gholam Ahmud being the owner of the estates and indebted to the Government, these villages, as his property, were sold for the debt.

The leave to file a supplemental answer is stated to have been given under Section 5, Regulation IV. of 1793, which is certainly very general in its terms. But it is much to be regretted, if the practice of the Court be such as to warrant what has here taken place, if a defendant after having put in answer, stating facts which are within his own knowledge, or which he has the full means of ascertaining, may afterwards, on finding that he has no defence, as the case stands, do what the defendant has here been permitted to do, if he is at liberty, without any affidavit of the circumstances, without any explanation of the nature of the error which has been committed, or in what it has originated, or what is the correction to be made, or what the omission to be supplied, to make a totally new case, and state facts at direct variance with the statement in the first answer, and, of course, completely change the issue in the cause.

The replication to this answer, after alleging that the course of the Government, cancelling and annulling the contents of their first answer, was unprecedented, and alleging, as we think very reasonably, that the object of a supplemental answer was to supply what might have been omitted, and not, under the designation of a supplemental answer, to nullify the first, proceeded to re-state the original case, particularly charging and relying, by the eighth paragraph in the various proceedings which had taken place, by petition to the Collector, and otherwise, to stay the sale pending the plaintiff's appeal from the decree of 1825.

To this replication, the date of which does not appear, the Government Vakeel filed a rejoinder on the 28th of January 1841. At this time, at least, the papers in the office had been examined, but so far from there being the slightest denial of the facts alleged by the Plaintiff with respect to the applications to stay the sale, the replication alleges in so many words that the statement on that subject is favourable to the cause of Government, for the Sudder Court, notwithstanding that

a petition was filed praying for a postponement, would not interfere in the demands of Government.

Now we find by the 5th Section of the Regulation before referred to, that the defendant in his rejoinder is simply to deny the truth of the reply of the plaintiff, or the parts of it which he means to dispute. Here, so far from denying those facts, the defendant founds his defence upon them, and we must treat them as admitted. It is a mistake to assimilate (as was done at the hearing) these proceedings to the practice in the Court of Chancery in England. There the plaintiff has the means of compelling a distinct answer, Yes or No, to any allegation which he makes, and therefore it is not sufficient for him to say, such or such a fact is not denied by the answer—he must read an admission of it. The proceedings in the Indian Courts are of a totally different character.

The cause, being now at issue, was again brought before the Court on the 30th of January 1841, when it should seem that, according to Regulation XXVI, of 1814, Sec. 10, the Judge ought, after putting such questions as he thought necessary to the vakeels, to have pointed out to the parties the facts material to be proved, and called for evidence upon them; but, instead of this, various questions having been put to the plaintiff and his vakeel, and the answers taken down, the bearing or importance of which we do not understand, the case was adjourned.

On the 26th of April 1841, it came on once more, when, it is stated, the record was inspected, and without taking evidence, or, as far as appears, hearing the parties, the Judge thought fit to dismiss the suit, assigning, as one reason, a fact, of which not only there is not a shadow of proof, but which is directly contradicted by the whole evidence of the transactions, namely, that the villages had been purchased with the funds of Sheikh Gholam Ahmud, and had, therefore, been properly sold for payment of his debt to Government.

We are quite at a loss to comprehend the course which the Judge took upon this occasion, or to reconcile it with any view of law or of justice. The course which the plaintiff insisted ought to have been taken, is very distinctly pointed out in his petition of appeal to the Sudder Court of Allahabad, at page 35 of the Appendix, namely, that after the four pleadings had been filed, it behoved the Principal Sudder Ameen, in accordance with the provisions of Section 10, Regulation XXVI. of 1814, to have recorded a proceeding specifying the point or points to be established, and calling for evidence for and against the claim, with reference to the purport of the plaint and answer from the parties respectively, in order that each of the parties might file his evidence for or against the claim, from which full investigation might be had, and the merits of the case fully developed. He concluded his petition of appeal in these terms:—"That the Collector in his supplemental answer asserts that the property sold by auction was purchased with the funds of Gholam Ahmud, and the Principal Sudder Ameen also declares that the property was purchased with the funds of Gholam Ahmud; now plaintiff, appellant, consents to rest his whole case on this one point, that if, from the record of the case, the deeds of sale, and the papers in the Collectorate, it shall appear that the property was purchased with the funds of Gholam Ahmud, then plaintiff consents that it shall be excepted from his claim, otherwise, on the simple proof of its being the property of Sheikh Shookr-oollah, plaintiff is entitled to a decree on the ground of plaintiff's claim being entitled to a preference with reference to the claim of Government. On the above grounds, therefore, plaintiff, appellant, prays that the decision of the Principal Sudder Ameen be reversed, and his claim be decreed as justice requires." He added to this petition, as an exhibit, the decree of 1835.

This petition appears to have come before Mr. Tayler, the Judge of the Sudder Court, on the 5th of June 1841, and to Mr. Tayler the proceedings in the Court below seemed as irregular and unwarrantable as they appear to us. He accordingly called upon the Court below to explain its proceedings, and required a report

as to whether any proceeding had been recorded in this suit in conformity with the proceedings of Section 10, Regulation XXVI. of 1814, and in what respect the questions put by the Principal Sudder Ameen to the plaintiff are relevant to the cause. To this requisition the following report was returned by the Judge on the 10th of July 1841. "The facts are as follows, *viz.* :—After the four pleadings had been completed a notification was issued, specifying that the case would be taken up after eight days; subsequently thereto the case was brought up, when it appeared to me unnecessary to call for evidence in favour of and against the claim; consequently no such proceeding was recorded, and the case was decided. As the suit was brought to recover the sale proceeds of the village of Lehurtara from Government by right of a decree declaring the validity of the mortgage prior to the filing of the decree, the questions aforesaid were put with the view of ascertaining the nature of the mortgage. When, however, plaintiff put in the decree, and it appeared therefrom that it was not passed against the mortgaged villages, it did not appear right to cause Government to refund the sale proceeds, and the claim was in consequence dismissed."

It is impossible to avoid expressing some astonishment that any Judge could so entirely have miscarried in the discharge of his duty as the Principal Sudder Ameen appears by his own report to have done. There were only two courses which it was possible, with any show of reason, to adopt: the one was, if the proceeding were regarded as a supplemental proceeding to the suit of Jykisken Das against Shookr-oollah and Gholam Ahmud, and the facts were considered to be sufficiently established on the part of the plaintiff, to make at once a decree in his favour; the other was to direct the evidence to be taken, and give the parties an opportunity of establishing their respective allegations. To dismiss the suit under such circumstances was utterly out of the question.

On the 12th October 1841, the cause came on for hearing before Mr. Tayler. Mr. Tayler considered very properly that the great question was, whether the villages in question were the property of Shookr-oollah; for if they were, they were clearly subjected by the decree of 1835 to the demand of the plaintiff, and if they had been sold by the Collector as the property of Gholam Ahmud with notice of the plaintiff's equitable claim, the plaintiff had a plain right to recover the amount which had been received by the Collector.

Upon both these points, the latter of which indeed was not in controversy, Mr. Tayler was of opinion in favour of the plaintiff, for reasons distinctly stated in a very able judgment at page 48 of the Appendix, and he accordingly pronounced his decree that the decision of the Principal Sudder Ameen of Benares be overruled, and that the plaintiff recover from the Collector the amount of his decree to the extent of the amount which may have been appropriated from the sale proceeds and carried to the credit of the Government, together with interest thereon from the date of the institution of the suit till the time of payment, and that the plaintiff's costs, with interest from the date of the decision to the date of payment, be paid by the Collector.

The decision of the inferior Court being reversed, it became necessary that the papers should be laid before another Judge of the Sudder Court (Mr. F. Currie), who unfortunately differed from Mr. Tayler, and thought the suit should be dismissed; the third Judge (Mr. G. Powney Thompson) concurred in that opinion, and accordingly the suit was dismissed with costs, the plaintiff having been actually refused the opportunity of giving evidence in support of his case if it were not already proved.

We are clearly of opinion that the decree must be reversed and judgment given in favour of the appellant. The case itself is one of the simplest description. The plaintiff's testator having an equitable mortgage on the villages in question, of which the legal title was in Gholam Ahmud, institutes a suit against the mortgagor to recover the amount of his demand. Pending the suit, and while Gholam

Ahmud, the representative of the mortgagor, is a party to it, the Collector sells the property as if it were Gholam Ahmud's unincumbered estate, suppressing all mention of the mortgage of which he had notice. The demand in the original suit being established, this suit is brought to recover the amount which had been realised by the sale.

The objections founded on the Regulations of Limitations have obviously no bearing on the case. There has been a continued and uninterrupted claim from 1818 to the present time. As little ground is there for the objections founded on the Regulations with respect to Government sales. It is said that when property is sold by the Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the title. This may be very true, and it is an important distinction between the two classes of sales, but it has no bearing upon the present case. Here the Government officer having notice of an incumbrance, which is only an equitable charge on the property, suppresses all mention of it in the advertisement of sale, and conveys away the estate to the purchasers as unincumbered, and receives the full value as if it were free from mortgage. Can there be a clearer equity to call for repayment? or could there be a grosser injustice than to sue the purchasers? if indeed against them any case could be established, which is very doubtful.

The only doubt which we have felt is, whether a strict adherence to form might require us to remit the case back to India, in order to give the Government an opportunity of going into evidence to prove the allegation in their supplemental answer that the property really belonged to Gholam Ahmud. But upon a minute examination of the proceedings, and a careful consideration of them, we are of opinion that it was not competent to the Collector in this suit to dispute the ownership of Shookr-oollah. The Collector claimed under or in right of Gholam Ahmud, and as against him we consider the demand to have been established upon the estate as part of Shookr-oollah's assets by the decree of 1835, and we think that Mr. Tayler took a correct view of the subject in his judgment.

We shall humbly advise Her Majesty therefore to reverse the decree complained of, and to direct the amount received by the Collector from the sales of the villages in question with interest thereon, according to the rate payable in such cases, to be applied, as far as they will extend, in payment of the appellant's demand. The appellant must have his costs of the suit below against the Collector, and must, of course, be repaid what he has paid to the Government.

We have gone at so much length into the case, not only on account of its importance in point of value, and because such detail was requisite in order to explain more clearly the grounds of our judgment, but because some of the irregularities which have taken place are of a character which we think it may be useful to bring to the attention, not only of the Courts in India, but of the authorities at home, who we are very sure are desirous that justice should be administered in these Courts fairly and indifferently between themselves and their subjects.

The 21st June 1853.

Present :

T. P. Leigh, Sir E. Ryan, and Sir J. Patterson.

Gift—Relinquishment.

On Appeal from the Sudder Dewanny Adawlut of the N. W. P.

Kadir Buksh Khan,

versus

Fusseeh-oon-nissa and Moobaruk-oon-nissa.

A concurrent judgment of the Lower Courts affirmed, rejecting a claim to a moiety of Maafee and other zemindary property under alleged deeds of gift and relinquishment by a deceased Mahomedan widow and her married daughter and two unmarried grand-daughters in favor of her husband.

The Right Hon'ble Thomas Pemberton Leigh (Chancellor of the Duchy of Cornwall).—MR. WIGRAM, we do not think it necessary to give you the trouble of addressing us. This is an appeal from the Courts in India upon a question of mere fact, as to which, both the first Court and the Court of Appeal concur, without any doubt or hesitation, in establishing the title of the respondents in this case as heirs of their mother; and unless it could be made out perfectly to our satisfaction that upon such a point the Court below had miscarried in some obvious particular, we should never think either of reversing the judgment or of remitting it for further inquiry to the Court below. But, in truth, we cannot entertain the smallest doubt upon this case.

The facts are these. It is admitted on all hands, that the grand-mother of the present respondents, a lady of the name of Vizier-oon-Nissa, was, up to the year 1833, the owner of the property which is now in dispute. She died, I think, in the month of June 1833. Upon her death she left a daughter, an only child, who was the wife of the present appellant, and upon the death of Vizier, her daughter, Oomdut-oon-Nissa, the wife of the appellant, was entered upon the register of the Collector as the owner in her character of heir to her mother, and that is stated to have been done by the appellant, by his procurement, and with his consent. Oomdut-oon-Nissa lived until the month of August 1838, and upon her death an enquiry is made—a fowti-namah, or an account made by the Canoongoes, describing the death of the preceding owner, and describing the inheritance by the daughters, is produced to the Collector, that document being made out by those very Canoongoes, or at least, if not by all, certainly by one or two of those very Canoongoes, who now come forward to swear that they were witnesses to the deed by which these ladies were debarred of their title, or pretence of title, to this property. They are entered upon this register as the owners under these circumstances, and this also is represented to have been done by the consent and by the procurement of the appellant.

In 1839 the appellant either contracts another marriage, or at all events he introduces what is called a strange lady into the family, and thereupon a dispute seems to have arisen; the daughters quit the father, and then naturally, for the first time, a dispute arises as to who is the owner of this property. As long as the grand-mother and the mother survived, and as long as the daughters lived with the father, the father, the present appellant, would naturally and necessarily be in possession of this property. Possession is nothing at all. Possession is just as consistent with the title of his wife's mother, and of his own wife, and of his daughters, as it is with his own. Now what takes place? In 1839, upon this rupture taking place, disputes arise between the parties, and there is an attempt, by one side or the other, to take possession of this property by violence. That is brought before the Foujdary Court, a Court which can deal with nothing but possession, which is simply a Police Court, and which so far deals with the possession, that it prevents the occupation being disturbed by violence. An investigation there

takes place, and upon several occasions, before several Judges, the possession is awarded to the appellant, because he was in possession ; and the respondents are distinctly told in one of those documents (I forget which), as obviously it would be, that the possession is in the appellant : the Judge says, " I have nothing " to do but with the possession. I give the possession, therefore, to the father. I " make an order that he shall not be disturbed in his possession by violence ; but " if the daughters have the title to substantiate, which they appear to have, they " must proceed in a Civil Court, for the purpose of establishing it." They do proceed in a Civil Court, and then, for the first time, because a suit was instituted, or, I believe, Mr. Maule was right in saying a month or two before, in June 1840, for the first time after the dispute has arisen, and after it is obvious that these parties are to have recourse to a Civil Court, a document appears, to which I will pointedly advert. Observe, that from the first period of these disputes, although possession only was in question, it was quite obvious that the persons who had the title would necessarily, or very naturally, when the title was claimed by the opposite party, state their title. The Court says, " I cannot look at that ; the possession is now the only question ; " and therefore, if your title is not clothed with possession, you must go to another " Court to establish that title." But at all events, up to this period, not one word is heard of any one of these deeds beginning in 1833, and ending in 1839.

Now in this proceeding, at page 126, which takes place before Mr. Muir, and " in which allusion is made to the deed of gift of 1833, we find this statement : " That on a former occasion, in consequence of a petition, dated 26th September " 1832, being presented by Vizier-oon-Nissa, a perwanah was issued to the Tahsil- " dar, directing him to prevent interference on the part of Kadir Buksh Khan," that is, on the part of the appellant. Now the case which he set up in 1840 in his answer, which he alludes to now by anticipation, is this : he says, " On the 9th " of March 1833, a deed of gift had been made to me by Vizier-oon-Nissa of this " property ;" therefore this is the way in which this deed of gift is spoken of in this instrument to which I am now referring. In the first place, it is stated that Vizier-oon-Nissa had applied to the Court on the 26th September 1832, and had obtained an order to the Tahsildar, directing him to prevent interference on the part of Kadir Buksh Khan, the appellant. It does not seem that the terms on which these parties were living were such as to make it very probable, that at that time, at all events, or immediately about that time, such a deed as this would be executed. But it goes on,—and this which I am now about to read is the representation of the Mokhtar of the appellant, that he " had been for a long time possessed and " seised of the maafee and zemindary estates ;" and that he " had been the pro- " prietor of a moiety of the estates for upwards of twenty-six or twenty-seven years, " under a deed of gift from Mussumat Vizier-oon-Nissa, deceased." Now this is the first allusion which we have to this deed of gift, and, according to the terms used in this statement, it must have been dated twenty-six or twenty-seven years before. If such a deed of gift as that had been executed, of course, it would have borne date somewhere about the year 1814 or 1815. This is the first allusion which we have to this deed of gift until we find it set up in the answer of the defendant. Now when we find it set up in the answer of the defendant, instead of being dated twenty-six or twenty-seven years before, it is dated, as it appears, in the year 1833, about seven years before the period at which these parties were in dispute.

Now the circumstance which takes place upon the death of Vizier-oon-Nissa, appears to be entirely inconsistent with the title which is now set up on the part of the appellant. On the death of Vizier-oon-Nissa, instead of entering his own name, the name of the wife is entered upon the documents ; and the ground which is stated for that in the deed itself is this, that is to say, in the last deed of 1839 : " On the death of Mussumat Vizier-oon-Nissa, the father of declarants, moved by " love and affection, caused the name of Mussumat Oomdut-oon-Nissa, his wife, to " be inserted in the fowti-namah of the deceased which was submitted to the Collec-

"tor." But if you compare that with the statement which is contained in the deed of relinquishment which is previously obtained from Oomdut-oon-Nissa, the reason which he there assigns for it is this, that Vizier-oon-Nissa died, leaving the Khan proprietor and that "the Khan, in observance of an ancient custom of the family, and also from motives of expediency, contemplates causing the registry of the name of the declarant in the office of the Collector of this Zilla in the place of the name of Vizier-oon-Nissa, the deceased lady." The two representations are totally consistent with each other. Again, upon the death of Oomdut-oon-Nissa, the reason which we find assigned in this deed of relinquishment, as it is called, of the 11th of April 1839, is, that he having become himself the owner and proprietor, in consequence of the deed of relinquishment by Oomdut-oon-Nissa, "subsequently Mussumat Oomdut-oon-Nissa, the mother of plaintiffs, departed this life by the pleasure of the Almighty, and the father of plaintiffs, in consequence of the great love he bore to the deceased, was plunged into the depths of grief and sorrow, and contemplate retiring from the concerns of this transitory world. In this his state, the names of declarants were inserted in the fowti-namah of Oomdut-oon-Nissa, deceased, which was submitted to the Collector." But how is this again consistent? The reasons assigned for the execution of these documents are utterly inconsistent with each other, utterly inconsistent with the position in which this party stood, utterly inconsistent with all probability, and all the usages which prevail in that country.

Now when these deeds are set up, this first instrument of 1833 is obviously the foundation of the whole title, because the subsequent instruments are merely a relinquishment, not a new grant, but an admission of the title of the appellant, founded upon the original deed of 1833. They are not intended to confer, and not expressing to confer, any beneficial interest then vested in the parties executing those instruments to the appellant, but are a recognition by them of the interest previously existing in him. The whole case therefore rests upon this deed of 1833, which is first stated in the year 1840 to have been made twenty-six and twenty-seven years ago, and which, when it is produced, is alleged to have been made in the month of March 1833; and it is upon the foundation of that document, and that document alone, that the title of the Appellant must depend.

Now when this deed was first produced, it appears (I am now reading from page 176 of the proceedings before the Sudder Ameen, who seems to have estimated this case with very great accuracy, and to have given, as it appears to us, a very able judgment upon the matter), that these parties who opposed this instrument alleged that the deed was a forged deed, and amongst other proof that it was a forged deed, or at least, that it was not what it purported to be, they said, "Upon this instrument is a stamp which was not in use at the time when the stamp is alleged to be granted." It is not as if that was an objection which had been taken at the hearing of the cause without the attention of the other side having been called to it; but it appears at page 176, that "on the 18th of September," which I take to have been 1841, "The plaintiff's vakeels put in a petition to the following effect: namely, that the defendant had put in a forged deed of gift. The stamp professes to have been purchased on the 19th July 1832, whereas on the 19th July 1832 no stamp paper of eight rupees' value was sold, and since the stamp was not sold on the part of Government on the said date, the defendant must have acquired the stamp by embezzlement, or the stamp must have been lost by Government, and on it the defendant has fabricated his forged deed. Plaintiffs therefore pray that the stamp may be forthwith examined, that the register of stamp sales be called for by a proceeding, and that justice be awarded." Here, in 1841, therefore, the attention of these parties is called to this circumstance, at least as affecting the genuineness of this deed; they are told, You have produced an instrument which purports to bear a stamp sold on the 19th of July 1832, and on the 19th of July 1832, no such stamp as that was in existence, and they pray to

have an enquiry. "Accordingly the deed aforesaid was examined in the presence "of the vakeels of both parties, and an order was recorded, that as the record was "under dispatch to the Sudder Court, no enquiry could at present be instituted." Subsequently, it appears that an enquiry was instituted, and they produce the register of stamp sales for the 19th of July 1832, with the seal and signature of the Collector, and this exhibit appears as No. 263 on the file. The sale of the stamp can nowhere be found in this document. Indeed, it appears from the register, that on that day no paper whatever of eight rupees' value was sold, nor did Vizier-on-Nissa purchase any stamp whatever on that date.

For these, amongst other reasons, to which we will presently advert, the Sudder Ameen was of opinion that this deed was a forgery. It then goes up to the Superior Court, and the Judge of the Superior Court, Mr. Tayler, not satisfied with what had appeared before the Court below, thinks it necessary to have a further enquiry with respect to this stamp. It had appeared that, by the list of the stamps sold on that day, no stamp of eight rupees had been sold, and no stamp whatever had been sold to Vizier-on-Nissa; but it had not appeared whether, at that time, stamps of that character had been issued by the Calcutta Government; and for this, he refers to the Collector or issuer of these stamps, and from him a report is made, that no such stamp was issued at that time, and none was despatched to this particular province until the month of September 1832. Upon this he finds, "From the report of the Collector, it is clear that the endorsement of the sale "of the stamp-paper is a fabrication, as the paper was not despatched from Calcutta before the month of September 1832.

Now, is it possible to say that these parties could require any further evidence with respect to this fact, whatever may be the value of it, than this? They had had the file of the Collector, which contains an account for the purpose of preventing the fabrication of instruments; they had had the file of stamps, sold on that day, produced. No stamp of that value was sold at that time, and no stamp sold to Vizier-on-Nissa. They had had, in addition to this, the fact subsequently established on the report of the Collector, that no stamps of that kind were issued at that date, and none were sent to the province until the month of September 1832.

This is not the only ground upon which the Court below proceeds. Its reasons are set out—at page 188—in the Sudder Ameen's judgment; and the reasons which he assigns are these:—"First, the stamp-paper on which the deed is written was "manufactured in 1832-33; the stamp is stated to have been sold in Saharunpore "on the 9th of July 1832. It is, therefore, obviously absurd that paper manufactured in 1832-33, should have been sold at Saharunpore in 1832. Secondly, "plaintiffs have filed the register of stamp sales for the 19th July 1832, with "the seal and signature of the Collector; and this exhibit appears as No. 263 on "the file. The sale of the stamp can nowhere be found in this document; indeed, "it appears from the register, that on that day no paper whatever of eight rupees' "value was sold, nor did Vizier-on-Nissa purchase any stamp whatever on that "day. Thirdly, the stamp was purchased on the 19th of July 1832, while the deed "of gift was engrossed on it on the 9th of March 1833, or nine months after the "purchase. No reason appears why this stamp was purchased eight months "prior to the making of the deed. Fourthly, the stamp bears an endorsement as "follows: 'This paper is sold for the purpose of writing an agreement.' It is not "stated that the stamp was sold for the purpose of writing a deed of gift." Then, after making other observations upon this document, he states the number of witnesses. He says: "Of these twenty-one witnesses who appear on the margin, the

Defendant has caused the depositions of Budr-ooddeen, Gholab Sing, Munsub Rai, Ghasee Ram, and Kenel-ood-deen, in all five witnesses, to be taken, and although "directed to adduce the whole of the witnesses in the proceedings of the 27th of "June and 3rd of July, he has not caused the depositions of the remaining witnesses to be taken. When the order to cause the testimony of the remaining

"witnesses to be taken was pressed upon the vakeels of the defendant on the 9th of the current month, the defendant's vakeels distinctly declined. It is obvious, therefore, that if this deed were a true document, the defendant would not have thus evaded causing the testimony of the other witnesses from being taken. Sixthly, of the five witnesses whose testimony the defendant has caused to be taken, two witnesses, viz., Ghasee Ram and Munsub Rai, are the Canoongoes of the mehal. In the fowti-namah of Vizier-oon-Nissa, which was submitted to the Collector with the arzee of the Tahsildar of the mehal, dated 4th April 1834, a copy of which Hossein Buksh Khan and Shumshair Khan," who are the original parties, "have filed in their suit, these identical Ghasee Ram and Munsub Rai, jointly with Choonee Lal and Jewahir Sing, Canoongoes, have distinctly mentioned the deed of gift alleged to have been made by Vizier-oon-Nissa in favour of Hossein Buksh Khan and Shumshair Khan, which deed was subsequently set aside by the Commissioner on an appeal by Oomdut-oon-Nissa." That was the document which was supposed by Mr. Maule to have been the deed of gift in question in this case, but it was another. "But of this deed of gift pleaded by the defendant, which the witnesses declare was witnesses and sealed by them, no mention whatever is made in the fowti-namah. The fowti-namah of Oomdut-oon-Nissa, copy of which the plaintiffs have filed as No 198 in this suit, was also drawn out by these identical Munsub Rai, Choonee Lal, and Jewahir Sing, Canoongoes; but neither in this have the aforesaid witnesses made any mention of the deed of gift pleaded by the defendant, but have stated, that on the death of Oomdut-oon-Nissa, this property passed by inheritance to the plaintiffs."

It appears to us, therefore, really, that even if there were no suspicious circumstances attaching extraneously to the instrument which is here relied upon, the whole circumstances of the case are so utterly inconsistent with the existence of any such document, and that these transactions are so entirely inconsistent with what could possibly have taken place if such a deed of gift had been executed, that the decision of the Court below is the correct one; and when we add to that circumstance the extreme suspicion and utter impossibility of its being a document such as it purports to be, and made and executed at the time at which it purports to have been, we think that the Court could, by possibility, have come to no other conclusion than that at which they have arrived, and that the appeal must be dismissed with costs.

The 30th June 1853.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir J. Dodson.

Evidence—Banker's Books.

On Appeal from the Sudder Dewanny Adawlut of the N. W. P.

Rai Sri Kishen,
versus

Rai Huri Kishen.

The mere production of Banker's books is not sufficient evidence to establish a debt. There must be some acknowledgment by the debtor of the correctness of the books, or some recognition by him to render those books binding evidence against him.

THEIR Lordships do not think it necessary to hear the respondents in this case.

This is an appeal from the decision of the Sudder Dewanny Adawlut of the North-Western Provinces reversing, by their decision, the decision of the inferior Court in favour of the present appellant.

The nature of the case between the parties is this; that the appellants are Bankers, and they bring this action against the defendant, who is the son of a deceased customer, for the purpose of recovering a balance which they represent to

have been due to them at the time of the death of that customer, I think in the year 1838.

This question has been fully investigated by the Court of Sudder Dewanny Adawlut, and the Judges of that Court have arrived unanimously at the conclusion that the case made by the appellants cannot be sustained. It is very difficult, of course, for us to think of reversing the unanimous sentence of the Judges of that Court, which had greater power and greater means of adjudicating upon questions of this nature than we have, and of reversing that judgment upon a simple question of fact; and unless, therefore, we should be satisfied by the most clear and convincing proof that the Judges of the Court below had, upon the evidence, arrived at a conclusion perfectly incapable of being maintained according to the case which has been made before them, it can hardly be expected that this Court would reverse a judgment pronounced after due consideration of all the evidence laid before them.

Now the question which we have to consider here is, whether the appellants have or have not proved a balance of 46,000 rupees, which they claim to have been actually due to them at the time of the death of Rai Bunseedhur in the year 1838. The evidence which has been adduced upon their part, I think, may be classed under three heads, and three heads only. It consists of what is called a rookah, or an acknowledgment of a balance, said to have been signed by Rai Bunseedhur, of letters said to have been written by Rai Bunseedhur, and of parol evidence adduced before the Court for the purpose of proving admissions by Rai Bunseedhur of the amount of 42,000 rupees having been due from him upon the balance of his account to the appellants.

Now with reference to the rookah—suppose we assume for the present purpose that that rookah was perfectly genuine—the rookah can amount only to an admission of the balance due at the time when that rookah was signed, and it will amount therefore only to an admission that in July 1831, which was the date of the rookah, 20,000 odd hundred rupees were due from Rai Bunseedhur to the appellants at that period. That, of course, is no evidence that the sum of 42,000 rupees was due at the death of Rai Bunseedhur, seven years after the period when that rookah was signed. Therefore, if the case rested upon the rookah alone, there would be no evidence upon which it could be said that the conclusion of the Court below could be in any degree impeached.

Then upon the second branch of the appellants' case there are put in some letters said to have been written by Rai Bunseedhur; but I do not find upon the examination of those letters that they contain any distinct admission of any exact balance due from him at the periods when those letters were written. And supposing even that they had contained any such admission, it appears that those letters do not go below the period of 1832. I am not quite sure whether I am accurate as to the date upon the subject, but I do not think they go beyond the period of 1832.

Mr. Forsyth.—1836, my Lord.

Lord Justice Turner.—1836 then, two years before the death of Rai Bunseedhur. The same principle that applies to the rookah applies equally to the admissions contained in those letters, even if those letters had contained any admission of an ascertained balance due from Rai Bunseedhur. The documentary evidence, therefore, wholly fails to prove the case which has been made on the part of the appellants; and the appellants, therefore, if they can maintain their case, must maintain it entirely upon the parol evidence.

Now, looking at the character and position of the witnesses who have been called to establish the acknowledgment said to have been made by Rai Bunseedhur in the year 1838, all of whom were servants of the appellants; looking, also, at the fact, that no account appears to have been delivered to Rai Bunseedhur at the period when those admissions were made, it seems to their Lordships that it is impossible consistently with justice, to deal with those admissions as binding upon Rai

Bunseedhur for the purpose of establishing a debt to this amount as due from the estate of Rai Bunseedhur at the period of his death. It has been very truly observed by M. Forsyth in arguing the case upon the part of the appellants, that the appellants have in truth proceeded upon the assumption that their books would be sufficient evidence for them to establish a debt against Rai Bunseedhur; but, of course, it is unnecessary to say that they have been wholly mistaken in that assumption, and that those books could not, without proof of communication with Rai Bunseedhur, be used in evidence as against him. There must have been acknowledgment by Rai Bunseedhur of the correctness of the books, or in some manner a recognition by him to render those books binding evidence against him.

Now, therefore, even if we assume these letters and this rookah to be in all respects genuine, those documents would not be sufficient to maintain the appellants' case; and the parol evidence is, in their Lordships' judgment, wholly insufficient for that purpose.

But, in thus dealing with the case, their Lordships consider that they have given the appellants a very great benefit; for, looking at the evidence in this case, and at the circumstances under which that evidence has been brought forward, it seems to their Lordships very difficult, to say the least of it, to consider that those documents are true and genuine documents. This action was commenced upon the banking account: the defendant, the respondent in the present case, in his answer to that action strictly challenged the plaintiffs, the appellants, with having nothing to maintain their case but their own books, and he disputed the admissibility of those books in evidence against him. The appellants, therefore, must then have been fully apprised that it was necessary for them to bring forward evidence confirmatory of those books; but that having occurred in, I think, the year 1838, it is not until the year 1840, or I believe 1842, I am not quite sure, that these documents, the rookah and the other letters, are brought forward on the part of the appellants.

Mr. Forsyth.—1841, my Lord.

Lord Justice Turner.—1841. Independant of that, the evidence which is given by the several witnesses—and I should observe that neither that rookah nor those letters are identified by any one single witness in this case, as Mr. Forsyth observes—the rookah and the letters were introduced into the case at a period subsequent to the examination of the witnesses in the cause: it is clear, therefore, that none of these witnesses have, in any manner, identified those documents—but independent of that, when we examine the parol evidence upon the subject of the rookah, it appears that two of the witnesses who were examined upon the subject differ as to the fact of by whom that rookah was written; and there are other inconsistencies in the evidence. Then, again, must be taken into account, in considering whether any weight can be possibly given to those documents as evidence in the cause, the character of the witnesses—that with reference to several of them, indeed most of them, they were the servants of the appellants; and one of whom, on whose evidence Mr. Roupell mainly relied, Atma Ram Dichit, appears, from other parts of this case, to have been the servant of the father of the appellants.

Besides these circumstances, which attach suspicion upon the documents, there is also to be considered the character and nature of the account. Now the account which is furnished on the part of the appellants contains, among other items, a very large amount of items for payments made by the appellants, as it is represented, for pensions to or allowances to different members of the family of Rajah Putni Mull, but it is most singular that several of those payments were said to be made by the authority of Rai Bunseedhur; but the proof of the authority to make the payments wholly fails, except as it is proved by the accounts. But, independent of that, it appears that those payments have, ever since the death of Rai Bunseedhur, been continued to be allowed and to be entered in the banking account against Rai Bunseedhur's estate. Of course, if those payments were made by the authority of

Rai Bunseedhur, then by the authority of the successor of Rai Bunseedhur ought those payments to have been continued.

Looking, therefore, at this case in all views, we are perfectly satisfied that this Court cannot, with any reasonable safety, disturb the judgment which has been arrived at in the Court below; and this appeal, therefore, must be dismissed, and dismissed with costs.

The 25th July 1855.

Present :

The Right Hon'ble T. P. Leigh, Lord Justice Knight Bruce, Sir E. Ryan,
Lord Justice Turner, and Sir John Patterson.

Resumption—Re-assessment—Ghatwalee lands in the zemindary of Khurruckpore—Costs.

On Appeal from the Special Commissioner for Calcutta and Moorshedabad.

Rajah Lelanund Sing,

versus

The Government of Bengal.

The Ghatwalee lands in the zemindary of Khurruckpore are not liable to resumption and re-assessment under Clause 4 Section 8 Regulation I of 1793 relating to Thannah or Police establishments.

The Government having persisted in their claim after several decisions against them by their own officers acting as Judges, were adjudged liable to pay all the costs of the case.

THE question to be decided in this case is the validity of a claim made by the East Indian Company to resume for the purposes of revenue assessment, against the Rajah of Khurruckpore, 755 beegahs of land (between three and four hundred acres), part of his zemindary. Their Lordships had no doubt at the hearing of the appeal as to the advice which it would be their duty to tender to Her Majesty as regards the particular case. But it was stated that there were ten other suits which would be governed by the present decision, and it was obvious, from the nature of the claim that, if it could be maintained, it might effect a very great extent of land throughout the provinces included in the Decennial Settlement. Their Lordships were, therefore, anxious to explain fully the grounds of their opinion, and by enabling parties to judge what cases will or will not fall within their decision to prevent as far as possible further litigation, by stating with particularity the grounds of their judgment.

The lands sought to be resumed are of what is called ghatwallee tenure, and the great question in the case is, whether lands of this description are liable to be resumed under Regulation 1 of 1793 s. 8, Clause 4, relating to Thannah of Police establishments.

As the question depends on the effect of the Settlement of 1793, and the changes which were then introduced, it will be convenient to advert to the state of these provinces, and the mode in which they were administered previously to that time. The three provinces of Bengal, Behar, and Orissa were ceded by the Mogul to the East India Company in the year 1765.

At this time the territorial division of the country was into mouzahs or villages occupied by ryots; pergunnahs, each of which included several villages; and zemindaries, varying in extent from a moderate English estate, to districts equal to or larger than many European principalities. The zemindary of Beerbhoom, which immediately adjoins Khurruckpore, is stated in a document dated in 1786, to which we shall have occasion to refer, to be twice as large as the Kingdom of Sardinia. Khurruckpore was probably of inferior but still of vast extent.

Many of the greater zemindars within their respective zemindaries were entrusted with rights and charged with duties which property belonged to the Government. They had authority to collect from the ryots a certain portion of the

gross produce of the lands. They in many cases imposed taxes and levied tolls, and they increased their income by fees, perquisites, and similar exactions, not wholly unknown to more recent times and more civilized nations. On the other hand they were bound to maintain peace and order and administer justice within their zemindaries, and for that purpose they had to keep up Courts of Civil and Criminal justice, to employ kazees and canoongoes, and thaunadars, or a Police force. But while, as against the ryots and other inhabitants within their territories, many of these potentates exercised almost regal authority, they were, as against the Government, little more than stewards or administrators. Their grants were only from year to year; the amount of their jumma or yearly payment to Government was varied or might be varied annually; it was an arbitrary sum fixed by the Government officers, calculated upon the gross produce of the zemindary from all sources, after making an allowance to the zemindar for his maintenance, and for the expenses of the collection and of discharging the public duties with which he was entrusted by the Government. Amongst the lands thus granted to the zemindars were often included lands which had been appropriated to the payment and support of the public officers and servants of the zemindaries or villages included in them. These lands were called chakeran lands; and it appears that, under the ancient system, such lands were usually exempted from assessment in favor of the zemindar, though they had no legal title to exemption. But there was another class of lands called lakheraj, which, by reason of a special exemption in a royal grant, or by having been legally devoted to religious uses, or by other means, had become or were claimed by their owners to be free from lakheraj or assessment to the Government.

The Police of the country was maintained by means of thannahdars or Police officers kept by the zemindars, and appointed and paid by them; but, where no other provision existed for their maintenance, the expense was in effect defrayed by the Government, either by direct allowances to the zemindar, or by deduction from his jumma, or by excluding from assessment, or assessing below their value, lands appropriated to that purpose by the zemindar.

In addition to the Police force thus kept by the zemindar at the expense of the Government, and which seems to have been usually very inefficient, private individuals and communities were accustomed to keep watchmen for the protection of their persons and property, under the name of chowkeedars and various other names, who were paid by their employers, and for whom no allowance was made by the Government.

Besides the disorder which prevailed generally through the provinces, particular districts were exposed to ravages of a different description. The mountain or hill districts in India were at this time inhabited by lawless tribes, asserting a wild independence,—often of a different race and different religion from the inhabitants of the plains, who were frequently subjected to marauding expeditions by their more warlike neighbours. To prevent these incursions, it was necessary to guard and watch the ghâts or mountain passes through which these hostile descents were made; and the Mahomedan rulers established a tenure called ghatvallee tenure by which lands were granted to individuals, often of high rank, at a low rent, or without rent, on condition of their performing these duties, and protecting and preserving order in the neighbouring districts.

Nothing could be more deplorable than the state of the provinces under this system. Murder and rapine were common throughout the country,—more than half the lands were waste and uncultivated,—and neither the ryots nor the zemindars had any inducement to improve them, as any increase in their value had only the effect of increasing the Government assessment.

It was considered by the East India Company that the first step towards a better system of Government, and the amelioration of the condition of their subjects, would be to convert the zemindars into landowners, and to fix a permanent annual

jumma or assessment to the Government, according to the existing value, so as to leave to the land-proprietors the benefit of all subsequent improvements.

Accordingly, they determined to make the assessment in the first instance for a period of ten years, with a view to its being ultimately made permanent.

In 1789, the original Regulation relative to the Decennial Settlement of Behar was issued; the Settlement in the other provinces being in subsequent years.

1. By that Regulation it was provided that a new Settlement of the land revenue should be concluded for a period of ten years.

By Section 2 it was provided that it should be at the same time notified to the landholders with whom the Settlement might be concluded, that the assessment fixed by the Decennial Settlement would be continued after the expiration of the ten years, and remain unalterable for ever, provided such continuance should meet the approbation of the Court of Directors.

31. By Section 31 it was ordered that the allowances of the kazies and canoon-goes heretofore paid by the landholders, as well as any public pensions hither to paid through the landholders, be added to the amount of their jumma, and be in future paid by the Collectors on the part of the Government.

Ditto 103.

33. The assessment was to be exclusive of all lakheraj lands, whether exempt from lakheraj with or without authority.

37. Chakeran lands, or lands held by public officers and private servants in lieu of wages, were not to be excluded, but were to be subject to assessment in common with the other lands in the zemindary, the exemption which such lands had previously enjoyed being thus destroyed.

72. The landholders were declared responsible for the peace of their districts, as theretofore, and were to act agreeably to such Regulations on this head as might be thereafter enacted.

Ditto 109.

1. The jumma was to be fixed by the Collectors on fair and equitable principle with the reservation of the approbation of the Board of Revenue, to whom he was to report the grounds of his decision.

2. The Collectors, in fixing the jumma, were to adopt the following as a general rule:—That the average product of the land in common years be taken as the basis of the Settlement, and from this deductions be made equal to the malikana and kurcha, leaving the remainder of the jumma of Government.

The malikana is the allowance for his maintenance made to the zemindar, and the kurcha is the disbursements and outgoings allowed to him against his receipts.

At this period the Rajah Kader Ali was the zemindar of Khurruckpore. It is situated in the zillah of Bhaugulpore on the frontiers of the province of Behar, and forms a considerable principality, including many pergunnahs, and amongst others the pergunnah of Gordah, in which the lands in dispute are situate. A very large quantity of lands within this district had been granted by the ancestors of the Rajah on the ghatwallee tenure before described. In the tuppah of Dhumsaen, a sub-division of the pergunnah of Gordah, no less than thirty-five villages were held at this time upon this tenure by ghatwals, and, amongst others, the lands in question, by an ancestor of the original defendant in these proceedings.

The extent and particulars of these vast estates, and the particulars of the ghatwallee tenures, were well known to the Government of Bengal at the time when the Settlement was made. Some years before, in consequence of disturbances which had taken place in the country during the time of Kader Ali's father, the Government had found it necessary to interfere with a Military force, and, having displaced the then Rajah, and restored tranquillity, had placed the zemindary under the charge of one of their own officers, Mr. Augustus Cleveland, who had the management of it up to the year 1781, about which time Kader Ali, his father, having died, was put into possession of the Raj.

It appears from evidence in the cause that Mr. Cleveland, during the time that he was in charge of these estates, had granted no less than 87,084 beegahs of land in this and (we presume from the extent) adjoining district upon ghatwallee tenure, in conformity with the orders of Government. (Rep. of Coll. of Bhaugulpore, 19th Nov. 1813, App. 7.) It appears from other evidence (Sutherland's Rep., 8th June 1819, Sup. App. 2.), that the grants before Mr. Cleveland's time to the ghatwals reserved a payment of two annas per beegah as a fee or perquisite to the zemindar, that some sunnuds were granted unadvisedly by Mr. Cleveland without such reservation, but that he afterwards insisted on such payment being made to the Government while he was in charge on behalf of the Government, and that all grants subsequently made by the Rajah of Khurruckpore contained the same reservation.

In 1789-90 the jummah to be paid by Kader Ali was to be fixed, with a view to the Permanent Settlement. As might be expected, considering the magnitude of the estate, it appears to have undergone great consideration. Every village was enumerated and entered; the deductions and allowances to be made out of the income, and the particulars of the lands to be excepted from the assessment (for some lands called nunkar lands were excepted), were the subject of correspondence between the Collector of the district and the President and Board of Revenue at Fort William (Sup. App. 9); and finally the jumma was fixed at 65,459 rupees Sas. 10½ pies.

It is beyond dispute, and, indeed, in this case has been fairly admitted, that the ghatwallee lands formed part of the zemindary. It is equally clear that they were included in and covered by the assessment. Had they been excluded, the accounts to show it are in the possession of the Government, and might have been produced; but the contrary is perfectly clear upon the evidence, and, indeed, is found as a fact in the cause by the Special Commissioner, Mr. Moore, in his judgment of the 17th May 1843.

Whether they were or were not productive of revenue to the zemindar is not material; though, if it were important, a careful examination of the evidence has satisfied their Lordships that there was at this time some profit derived from them by the zemindar, even in money; but at all events he derived the benefit arising from the services of the ghatwals, and enjoyed the valuable right of appointing the individuals who, with the lands, were to take upon themselves the duties of office. It was not the intention of the Settlement that no lands should be covered by the jumma which did not actually produce income, and therefore contribute to increase the jumma at that time. On the contrary, probably more than half the lands in the country were waste and unproductive at this period, and one of the main objects of the Permanent Settlement was to bring them into cultivation.

Thus matters continued up to the year 1792. The thaumadars or public Police officers appointed by the zemindars had been found very inefficient, and the Government had appointed officers of their own to assist in keeping order, who had concurrent jurisdiction with those named by the zemindar. But in the year 1792 the Government determined altogether to suppress the thaumadhs or Police establishments maintained by the landholders, and to take to themselves exclusively the preservation of peace and the prevention of crime by means of a Police force of their own, to be established at convenient stations throughout the provinces. As the landholders were to be relieved from the expense to which they were subject for the maintenance of the force now to be suppressed, it was very reasonable that, where allowances for such expenses had been made by the Government, they should no longer be continued, and the Government, therefore, resolved to reserve the right of discontinuing them, or, where lands had been allowed for the purpose, of resuming them.

To carry these arrangements into effect, Regulations XLIX and L of December 1792 were issued.

The preamble of Regulation XLIX recites in strong language the disorders which prevailed, and the utter inefficiency and frequent corruption of the thannadars employed by the landholders.

Section 1 provides that the Police of the country is in future to be considered under the exclusive charge of the officers of the Government, who may be specially appointed to that trust. The landholders and farmers of land, who keep up establishments of thannadars and Police officers, for the preservation of the peace, are accordingly required to discharge them, and all landholders and farmers of land are prohibited entertaining such establishments in future.

By Section 2 landholders and farmers are no longer to be held responsible for robberies committed on their respective estates. Provision is then made for the appointment of a Police force in different stations throughout the provinces, each under the charge of a darogah or superintendent, and the whole is subjected to the control of the Magistrate.

It is clear that the Police force here spoken of is distinct from the chowkeedars and village watchmen, for these persons are by the 12th Section declared subject to the orders of the darogah, and by the 13th Section are ordered to apprehend and send offenders to the darogah, and afford every information to him.

By regulation L of the same year, 1792, a tax is to be levied within the district of each Police establishment for defraying its expenses ; and the 17th Section which is very important, is in these words ;—it is a circular addressed to the Magistrate of each district :

17. " You will report whether the landholders have been allowed any deductions on their jumma, or are in the receipt of any money allowances, or hold any lands either free of at a reduced revenue, for the purposes of keeping up thannadars or other Police officers, and also your opinion whether the whole or any and what part of such deductions, allowances, or produce of such lands may with equity be brought to the public account, in consideration of the landholders being now prohibited from keeping up such establishments, and Government having taken upon itself the charge of the Police."

Nothing can be clearer than this,—that the lands referred to are lands which the zemindars had been permitted by the Government to hold free from revenue, or at a reduced revenue, for the purpose of keeping up thannadars ; not lands which the zemindars had permitted other persons to hold free from rent, or at a reduced rent, or lands which such persons had a right to hold free from rent or at a reduced rent ; and that any lands which were in the first predicament were to be reported to the Government by the Magistrate, together with his opinion whether it was consistent with equity that the whole or any part of the produce of such land should be brought to the public account ; and further, that this provision relates and is confined to a class of officers whom the zemindar is no longer permitted to keep.

Though the Decennial Settlement had been made as to the several provinces of Behar, Bengal, and Orissa under different Regulations,—and although as to some of the estates the Settlement had not been entirely concluded in 1793,—it was thought right in that year finally to establish its permanency, and for this purpose the celebrated Regulations of 1793 were published.

They were many in number, and re-enacted, with respect to all the provinces collectively, with some modifications, the Regulations which had been previously issued with respect to them separately.

By Regulation I Section 1 the Settlement was declared to be unalterable.

The Clause relating to the resumption of allowances which had been made to the zemindars for Police establishments is in these words :

" Regulation I Section 8 Clause 4. The jumma of those zemindars, independent talookdars, and other actual proprietors of land, which is declared fixed in the foregoing Articles, is to be considered entirely unconnected with and exclusive of

any allowances which have been made to them, in the adjustment of their jumma, for keeping up thannahs or Police establishments, and also of the produce of any lands which they may have been permitted to appropriate for the same purpose; and the Governor-General in Council reserves to himself the option of resuming the whole or part of such allowances or produce of such lands, according as he may think proper, in consequence of his having exonerated the proprietors of land from the charge of keeping the peace, and appointed officers on the part of Government to superintend the Police of the country. The Governor-General in Council, however, declares that the allowances or produce of lands which may be resumed will be appropriated to no other purpose than that of defraying the expense of the Police; and that instructions will be sent to the Collectors not to add such allowances, or the produce of such lands, to the jumma of the proprietors, but to collect the amount from them separately."

Upon the meaning of this Clause the question in this cause depends. It is obvious that it has reference to the Police Regulation of 1792, and to the allowances with respect to which an enquiry was directed to be made in that year. It is unnecessary, therefore, here to repeat the observation already made as to their effect.

By Regulation XXII of 1793 the same enquiries are directed to be made by the Collectors as had been ordered to be made by the Magistrates in 1792; but as the language is not precisely the same, it may be as well to state the Clause at length. It is Section 36, and is in these words:—

"The Collectors are to report all allowances that may have been made to the proprietors of land for keeping up Police establishments, either by deduction from their jumma, or by permitting them to appropriate the produce of lands for that purpose, or in any other mode, which may not have been already resumed, with their opinion how far the whole or any portion of such allowances can with equity be resumed in consequence of the proprietors of land being exonerated from the charge of keeping the peace, as declared in Regulation XXII of 1793, which Regulation had re-enacted the provisions of Regulation XLIX of 1792."

The same provision with respect to chakeran lands and lakheraj lands, which had been contained in the Regulations of 1789, are repeated in those of 1793, *viz.*, that the chakeran lands should be included in the Settlement, and the lakheraj lands excluded from it.

Although both the lakheraj lands and the thannadary lands are reserved for further enquiry under these Regulations, there was obviously a great distinction between them with respect to the period at which the decision relating to them was to be made.

The lakheraj lands were separate from the zemindary, and were excepted out of the Settlement. The validity of the exemption claimed for them depended on the validity of the grants under which it was claimed. Very many were believed to be fraudulent; but each case must depend upon its own circumstances. The investigation of such circumstances might occupy a long time, and a discovery of grounds of suspicion might take place at any period. As they were not to be included in the Settlement, no great inconvenience could arise from delay.

But with respect to the allowances for a Police force made by the Government, whether in land or in money, the case was quite different. They were included in the Settlement; and, if any additional charge was to be thrown upon the landholder in respect of such allowances, it was necessary that it should be ascertained as part of the Settlement. No difficulty in ascertaining the fact could possibly exist. The assessment had been very recently made,—in some cases indeed was not yet complete,—and the officers who made it must be perfectly aware whether any such allowances had or had not been made.

In pursuance of these Regulations, Mr. Dickenson, the Collector of Bhaugulpore, was required to report whether, in the Settlement for Khurruckpore, any such allowances had been made; and on the 29th April 1794 he makes his report in the

negative. His words are these, contained in a letter addressed to the President and Members of the Board of Revenue of Fort William, relating to this and other zemindaries :—" In obedience to the 36th Article, I have made the necessary enquiries, but do not find that any allowances, either by deduction from their jumma, permission to appropriate the produce of lands, or any other mode, have been granted to any proprietor for keeping up a Police establishment." Supplemental Appendix 13.

This enquiry took place before any permanent grant had been made of this zemindary, and with a view to such grant. No claim to resumption of lands or to alteration of jumma was, or, upon the footing of the report, possibly could be set up by the Government ; and nearly two years afterwards, *viz.*, on the 25th January 1796, the Government made a grant to the Rajah of the whole zemindary of Khurruckpore, including the lands in question, to hold to him in perpetuity at the jumma assessed in 1789-90, *viz.*, 65,459 Rs. 8 as. 10½ pies. Appendix 17.

It is said that Mr. Dickenson made this report under a mistake. A mistake of what ? Not of facts, certainly. The existence and nature of these ghatwallee tenures, the extent to which they prevailed in this district, and the mode in which they had been dealt with in making the assessment, must, from the circumstances which have been stated, have been perfectly familiar both to the Collector and to the Board of Revenue.

But was he under a mistake of law ? That he considered the ghatwallee lands as not within the meaning of the Clause in question, is abundantly clear ; and, if he was mistaken as to the intentions of the Government who had framed it, a mistake so deeply affecting their revenues, and reaching to such a great extent of territory, must at once have excited the remarks and the remonstrance of the Revenue Board ; but they make no objection to his view of the subject, and, accordingly, the grant is made on the terms already stated ; the grantee holds under it, and for more than forty years no attempt is even made to disturb it.

It would seem to be very difficult, under such circumstances, to permit any part of the lands so granted to be resumed on any allegation of mistake, if there were reason to suppose that any mistake had been made.

Indeed, by Regulation II of 1819 the East India Company formally " renounce all claim on the part of Government to additional revenue from lands which were included within the limits of estates for which a Permanent Settlement had been concluded at the period when such Settlement was so concluded whether on the plea of error or fraud, or any pretext whatever, saving of course mehals expressly excluded from the operation of the Settlement."

But their Lordships are far from thinking that there was any mistake, either on the part of the Collector or the Board of Revenue. All the information which their Lordships can obtain, with respect to those lands, leads to a different conclusion.

In Mr. Grant's Analysis of the Finances of Bengal, addressed to the Court of Directors in the year 1786, and printed in the Appendix to the fifth Report of the Select Committee on the Affairs of the East India Company, p. 268, the zemindary of Beerbhoom is stated to have been conferred by Jaffier Khan on an Affghan or Tartar tribe for the purpose of guarding the frontiers on the west against the incursions of the barbarous Hindoos of Jharcond, by means of a warlike Mahomedau peasantry entertained as a standing militia, with suitable territorial allotments, under a principal landholder ; and Mr. Grant afterwards describes the tenure " as in some respects corresponding with the ancient military fiefs of Europe, inasmuch as certain lands were held lakheraj, or exempt from the payment of rent, and to be applied solely to the maintenance of the troops."

There is no doubt that the tenures here spoken of are ghatwallee tenures, though they are not mentioned by that name.

Beerbhoom immediately adjoins Khurruckpore, and in 1795 some ghatwallee lands were transferred from Beerbhoom to the district of Bhaugulpore, in which

Khurruckpore is situate, and in 1797 lands of the same description were transferred from Bhaugulpore to Beerbhoom.

In 1813 a report was made by the Collector of Bhaugulpore to the Magistrate of Beerbhoom, in answer to certain enquiries with respect to ghatwallee lands in his district. Appendix 7.

The Collector states that the ghatwallee lands in his district are of four kinds.

1st.—The lands already referred to as granted by Mr. Cleveland. These he states to have been allotted in the environs of the forest at the foot of certain mountains, which he names in various pergunnahs, and amongst others “pergunnah Kanhjohe, and in some other villages of the Khurruckpore estates,” to certain ghatwals and watchmen, in lieu of salaries, in the proportion of the number of watchmen attending the said ghatwals, to attend to and guard the watch stations at the passes, and to patrol the precincts of the villages, that no mountaineers might be able to descend from those passes of the mountains to commit night attacks, to invade, assault, or to plunder money or cattle, or to create disturbance.

The 2nd class the report describes as “the ghatwals attached to the Khurruckpore estates, who pay a stipulated rate of rent for their lands and villages, being bound to protect and guard the highways, to watch the stations at the passes, to prevent disturbances being created by the mountaineers, thieves, and highwaymen. They hold their lands in virtue of sunnuds granted by the zemindar of Khurruckpore, except some who have received theirs from the former authorities.”

The report then proceeds to state “that when the zemindar, or Government authority, wishes to appoint a ghatwal to guard the frontiers of the villages, it is his duty to ascertain the produce of the villages, the quantity of ghatwallee lands therein, and, after deducting a certain rate in the ratio of the guards with the ghatwals, in lieu of wages, to fix a certain rent to be paid by the ghatwals.”

After mentioning other descriptions of ghatwallee lands, he states his opinion that the ghatwals have no right of inheritance or proprietary interest in their lands, but hold right of possession as long as they perform the terms and conditions of their sunnuds.

The report then states that at the time of the Decennial Settlement the ghatwals were not treated as independent talookdars; that no settlement was made with them; but that they were included in the Settlement of the zemindar of whom their lands were held.

In 1816 another report was made by the Collector of Bhaugulpore (Appendix 9), in which it is stated that the ghatwals pay a fixed rent to the zemindar of Khurruckpore, and continue under his control, direction and subjection, while the Rajah is answerable to the Collector for the rents of the entire Khurruckpore.

With respect to the ghatwallee tenures in Beerbhoom, it is stated, in a Regulation passed with respect to them in 1814 (Regulation XXIX of that year) that the class of persons called ghatwals in the district of Beerbhoom form a peculiar tenure, and that every ground exists to believe that, according to the former usages and constitution of the country, this class of persons are entitled to hold their lands, generation after generation, in perpetuity, subject, nevertheless, to the payment of a fixed and established rent to the zemindar of Beerbhoom, and to the performance of certain duties for the maintenance of the public peace and support of the Police.

This description is confined in terms to the district of Beerbhoom, but in the case of *Hurlall Sing v. Jowown Sing*, 6 Sud. Rep. 170, which occurred in 1837, a question arose as to the nature of these tenures generally, the point for decision being, whether they were divisible on the death of a ghatwal or descended to his eldest son. One of the Judges states that these tenures are very common in the Nerbudda territory, for the protection of the ghâts. Another of the Judges seems

to consider them as chakeran lands. And the Court was of opinion that the lands being held conditionally on the performance of certain defined duties, they were not divisible on the death of the ghatwal, but descended to the eldest son.

Lands so held could not properly be considered as lands of which the zemindars had been permitted by the Government to appropriate the produce to the maintenance of thannah or Police establishments. They were held by a tenure created long before the East India Company acquired any dominion over the country; and though the nature and extent of the right of the ghatwals in the ghatwalee villages may be doubtful and probably differed in different districts and in different families, there clearly was some ancient law or usage by which these lands were appropriated to reward the services of ghatwals; services which, although they would include the performance of duties of Police, were quite as much in their origin of a military as a civil character, and would require the appointment of a very different class of persons from ordinary Police officers.

We find accordingly that the office of ghatwal in this zemindary was frequently held by persons of high rank.

Before the date of the Regulations, and in 1783, we have a letter from the Collector to the Rajah Kader Ali, informing him that the Ranees Sobissuree (who from the title must have been a female of high rank) had been dismissed from her office of ghatwal of Jummee Hurnapoor, which is situate in the Khurruckpore estates, by order of the Governor-General in Council, and intimating that, "as the office is in your Highness' gift, your Highness will, should you deem it necessary and proper, appoint a person to the office of ghatwal of the said pergunnah, to watch day and night at the said ghât. Should it be advisable, your Highness may retain it under your Highness' control, informing the Court of the circumstance" (Appendix 14). Surely the language here used in speaking of the ghatwal is little suited to the appointment of a Police officer. It is rather that which in ancient times in England might have been addressed to a Lord of the Marches with respect to a chieftain under his orders.

Again, the officers contemplated by the resumption clause were a class whom the landowner was in future prohibited from keeping. Was this the case of the ghatwals? Why, we have a letter from the Collector of Bhaugulpore to the Rajah of Khurruckpore, on the 1st September 1808 (Appendix 14), in which he observes, "as the settlement of rent between the watchmen and yourself rests with you, as also does the dismissal and transfer of the ghatwals, &c., as usual and customary on your estate, the Magistrate has no objection to the measure" (which the Rajah had proposed to take), "nor is the Collector opposed to the step;" and in the reports of the Collectors to which we have already referred, it is stated that it is the province of the Rajah to appoint and dismiss the ghatwals attached to the Khurruckpore estates; that he usually, but not always, makes a report to the Government when he does so; "that the Settlement rests with him, and he raises or depresses the rent."

The appointment of ghatwal has been continued, with the assent of the Government, up to the present time.

Upon this review of the evidence their Lordships are of opinion that, if any attempt had been made in 1796 to resume these lands under the Regulation now in question, such attempts must have failed, and that, therefore, there can be no ground for the claim now set up by the Bengal Government.

It may be proper to notice the proceedings which have ended in the judgment against which the present appeal is brought.

It appears that on the 29th November 1836 the Government in India ordered that, if the ghatwalee lands were of a nature to be resumed, they be subjected to resumption. Appendix 3.

The proceedings to be taken for the purposes of resumption, and the Court or tribunal which is to decide the matter, are of a special character.

The Collector of the district, or his deputy, enters on record a claim to assess the disputed lands ; notice is given to the owners ; upon their answers, and upon evidence, the Collector who has made the claim, or one of his deputies, decides upon its validity ; and if either party is dissatisfied, there is an appeal to a Special Commissioner appointed by the Government.

On the 1st May 1838, Mr. Travers, then Special Deputy Collector of the districts of Bhaugulpore and Monghyr, entered the following claim on the part of the Government against Toofany Sing, ghatwal, who was in possession of the disputed lands in this case :

" Claim to assess 755 beeghas of ghatwallee lands situate on Ghât Foujdar, Tuppa Dhusaeen. As it appears from an examination of the Ghatwallee books furnished by the Magistrate of this district for the year 1819 C. E., that the lands in dispute have been appropriated rent-free by the said defendant, as belonging to the said ghatwallee ; and as it is necessary, under Regulation II of 1819 C. E., and Regulation III of 1828 C. E., to inquire into the legality or otherwise of the deeds of grant ; it is therefore ordered that this case be numbered, and placed upon the file of the Court, and that notice be served upon the defendant." Appendix 1.

It does not very distinctly appear from this statement of the claim upon what grounds it was intended to be rested, but we collect that it was thought that these lands were not included in the estate of Khurruckpore ; that they belonged to the ghatwal ; and that, as no settlement had been made with him, they were still the subject of settlement, or, in other words, of assessment.

The matter then came, upon some interlocutory proceeding, before Mr. Alexander, described as Officiating Special Deputy Collector of the districts of Bhaugulpore and Monghyr, and on the 10th November 1838 he made a minute in part in these terms :

" It is consequently decided that these lands were conditionally granted ; but, *firstly*, the officers do not perform those conditions ; and, *secondly*, the Government have no need of their services ; besides which it is evident that the said lands have not undergone any settlement up to the present time : for the settlement was effected in 1197 F. E., while the said lands were set apart in 1181 F. E., and, notwithstanding that 2 annas per beegah used to be paid to the zemindar for certain lands, yet as that cannot be considered rent, but a simple fee in acknowledgment of the right of the zemindar, the said lands are consequently of a nature to be resumed."

It is then ordered " that the defendant produce any document in his possession invalidating the above-mentioned circumstances within a week, otherwise judgment would go in favor of Government, without any plea in opposition being taken into consideration." Appendix 3.

The Rajah of Khurruckpore was apparently supposed to have nothing to do with the question ; he was not made a party to the proceedings, nor served with notice of them ; but on the 27th November 1838 he presented his petition, stating that he was the owner of the land, and that Toofany Sing held under a lease from him. Appendix 4.

The original defendant put in his answer, stating that he and his ancestors for several generations had held these lands at a rent of 2 annas per beegah from the Rajah of Khurruckpore, and that lands, including 36 original villages, besides others subsequently added, were held by the same tenure of the Rajah.

A great deal of evidence was gone into ; many inquiries were ordered, on the result of which it distinctly appeared that these lands were part of the estate of Khurruckpore, and had been included in the settlement for that estate ; and accordingly, on the 9th December 1838, Mr. Alexander pronounced a decision founded on those proofs, in which he declared that the lands were of the nature of chakeran lands ; that they were not of a nature to be resumed ; and he ordered the claim of Government to be dismissed. Appendix 32.

The same decree was at the same time pronounced by Mr. Alexander in ten other suits of a similar kind.

Not long after these judgments were pronounced,—judgments to which no objection can be made, except that they ought to have awarded costs of suit to those who had resisted the claims made against them,—Mr. Alexander, unfortunately for all parties, altered his opinion, and thought that, although the suits might not be maintainable on the grounds originally taken, they might be supported under Clause 4 Section 8 of Regulation I of 1793, and he applied for permission to review his judgment.

The forms of proceeding did not allow this to be done ; and on 31st December 1839 the Government appealed to the Special Commissioners, bringing forward the Clause just mentioned, and also insisting that the lands were not included in the Settlement of the Khurruckpore estate.

Before this appeal was heard, the interest of Rajah Ali Khan, the original opponent of the Government, had been assigned to the father of the present appellant, and he was admitted a respondent to the appeal of the Government.

During the course of these proceedings the same question had been raised by the Government with respect to other ghatwallee lands in other pergunnahs of this zemindary ; and on the 29th May 1838, Mr. Travers, in some of those suits, decided in conformity with Mr. Alexander's decision, and dismissed the claim of the Government ; and it is said that this decision was confirmed by the Special Commissioner on appeal. (Appendix 93).

Other suits, on the other hand, of the same description, came before Mr. Alexander, who decided them, not in conformity with his first determination, but according to the view which he had subsequently taken.

On the 21st May 1841, the appeal in the present suit came before Mr. Elliott, Special Commissioner, who reversed the decision of Mr. Alexander, stating as the ground of his judgment, "that it was evident that the ghatwallee lands in dispute in this case, as well as in the other ghatwallee suits, were distinct and separate from the settlement made by the Government ;" he established therefore the claim of the Government, and ordered that all the costs of the suit should be borne by the respondents. (Appendix 64).

Fortunately for the ends of justice, the concurrence of another Special Commissioner was necessary to give effect to this decision, and, on the 27th December 1842, the case came before Mr. D'Oyley.

Mr. D'Oyley differed from Mr. Elliott, and the case was therefore remitted to Mr. Moore, Special Commissioner for Calcutta and Moorsheadabad.

That gentleman directed an inquiry to be made (to which we have before adverted) of the Secretary of the Sudder Board, for the purpose of ascertaining whether the ghatwallee lands had been excepted from the settlement of the Khurruckpore estates or not ; and, finding that they had not been so excepted, he concurred in the opinion of Mr. D'Oyley, and ordered that the appeal of the Government in this and the other ten suits of the same nature should be dismissed. (Appendix 70).

The Government was still dissatisfied, and, on the 19th September 1843, they applied for a review of the judgment.

The case came again, on several occasions, before Mr. Moore, who directed many more enquiries, the result of which, in the opinion of their Lordships, was to confirm the decision at which he had already arrived. Mr. Moore, however, considered that his former judgment was erroneous, and, on the 9th July 1844, he reversed it. On the 9th September of the same year, Mr. Gordon, a Judge of the Sudder Court, vested with the powers of a Special Commissioner, under the orders of Government, expressed his concurrence in that decision ; and at last, on the 27th June 1845, a final judgment in favour of the Government was pronounced by those gentleman, resting their decision, as we understand it, on the grounds that these lands were in reality lands granted for Police establishments, and were to be considered as provided for in Clause 4 Section 8 Regulation I of 1793.

From that decision the present appeal is brought to Her Majesty in Council ; and it is scarcely necessary to say that their Lordships must humbly report to Her Majesty their opinion that the decision complained of ought to be reversed. They have already sufficiently explained the reasons for their opinion, *viz.*, that these lands are not properly within the meaning of the Clause relied on by the respondents ; that they were a part of the zemindary of Khurruckpore, and were included in the settlement for that zemindary, and covered by the jumma assessed upon it.

If any case should occur in which lands of ghatwallee tenure, though not in their Lordships' opinion properly falling within the meaning of the Regulation, have nevertheless been dealt with as such, and have not been included in the Settlement of 1793, such case will have to be decided upon its own circumstances, and will not be governed by their Lordships' present decision.

With respect to the costs of the proceedings which have taken place, their Lordships do not doubt that the Bengal Government, in bringing forward this claim, have acted under a sense of public duty ; but it is an attempt to disturb upon insufficient grounds a settlement which subsisted without dispute for above forty years, during all which time the right to disturb it, if it exists at all, existed with as much force as when the proceedings were instituted. It has been persisted in after several decisions against the Government by their own officers acting as Judges ; the decree in their own favor has been finally obtained upon grounds different from those on which it was originally sought, and the appellant has been exposed to a long and most expensive litigation. Under these circumstances their Lordships think that they should do but imperfect justice if they did not humbly recommend to Her Majesty that the respondents should be ordered to re-pay to the appellant all the costs which they have received from him under orders of the Judges below, and should also be ordered to pay to him all his own costs of these proceedings, including the costs of the present appeal.

The 17th July 1856.

Present :

The Chancellor of the Duchy of Cornwall, Sir E. Ryan, Sir J. Dodson, and Sir L. Peel.
Sheriff's Sale—Life Interest in residue of real and personal property of a Testator.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Beebee Tokai Sherob,

versus

Davod Mullick Fureedoon Beglar and Gabriel Avietie Ter Stephanoos.

A life-interest in the residue of the real and personal property of a testator after all the charges upon it have been satisfied and provided for, and after a full administration has taken place of the assets for the purpose of discharging these several dispositions, cannot be sold under an execution issued in the Supreme Court against the property of the testator.

Chancellor of the Duchy of Cornwall.—ON this appeal it is very possible, from the course which the parties have thought fit to pursue, that it may not be in the power of the Court to arrive at the substantial justice of the case, whether it affirms or reverses that judgment. But we can deal with the case only in the shape in which it comes before us.

The facts appear to be these. The appellant lived with an Armenian merchant of the name of Avietie Ter Stephanoos as his mistress. At what time this connexion began does not distinctly appear, but it had begun before the year 1827, and continued up to the time of Avietie's death in 1835. During the continuance of the connexion several transactions took place between this gentleman and the appellant, which appear to have been in the nature of purchases and sales.

Four different conveyances of property were executed by Avietie to the appellant, all purporting to be conveyances made for a valuable consideration *bond fide* paid. The *first* of these transactions took place in 1827; the *second* and *third* took place in the year 1832. One of the transactions, in the year 1832, was a conditional sale in the nature of a mortgage which was made absolute in the year 1840. The *fourth* was a transaction which took place in the year 1833, and was of this description: This gentleman, Avietie Ter Stephanoos, appears to have fallen into difficulties, and to have been sued by a number of creditors, and judgments having been obtained against him, a portion of his property was put up for sale in the year 1833, and purchased by an individual named Hurchunder, who is represented to have been an agent of the family of Avietie, and the conveyance and purchase under that execution was represented by Hurchunder to have been made on behalf of the appellant, and in 1837 the property was conveyed to her by him.

Now, before the death of Avietie, several other suits had been instituted against him: one by a person of the name of Petrose, and two by another creditor of the name of Beglar.

On the 17th of April 1835, Beglar instituted two suits: one claiming a balance of account, and the other claiming a sum of money for rent alleged to be due. It appears that Avietie lived but a few months, or perhaps a few weeks only, after the institution of the suit, and he died in the year 1835, before he had put in any defence to these suits. Upon his death, a summons was taken out calling on his heir or representative to appear and defend; and after some delay, Gabriel Avietie Ter Stephanoos, his son (though, as it appears, an illegitimate son only), appeared, and took up the defence to these suits. He appeared as the son and heir of his father Avietie. The suit appears to have been revived against him without any very particular enquiry as to the nature of the interest he had, but he was treated as the representative of his father in that suit. Decrees were obtained in one of these suits by Beglar, against Gabriel, and the suits being suits originally instituted against the father for debts due from the father, of course the decree ought to have been a decree against the son in his representative character—a decree, in short, against the assets of the father. Probably that may have been the intention of the decree, but the language of it is, according to our notion, a little unusual.

The first decree was made on the 31st of August 1836, and the other, I think, in December in the same year. The terms of that, or of the decree in the second suit (which appears to be much the same as the other), are at page 81:—

“The sum which the plaintiff is entitled therefore to recover from the defendant (who is the heir) is 381 rupees 8 annas 1 cowry, for interest; and principal, 2,591 rupees half anna; making a total of principal and interest to 2,972 rupees 8 annas 13 gundas 1 cowry; because, after the death of Gabriel Avietie Ter Stephanoos, that Khwaja Gabriel Avietie Ter Stephanoos, defendant, is his son and heir is evident from the answer, and the proceeding upon the record. Payment must, therefore, be made by the defendant.”

This is the form in which the decree was pronounced in both cases. It certainly is one which seems in its terms to imply a personal liability on the part of the son; but, at all events it was a decree against the son in his representative character; and had the proceedings been taken by Beglar as what is called in India the decree-holder, no doubt the assets of the father might have been made responsible for that debt.

Having obtained this judgment, Beglar proceeded to attach the property which was in the hands of the appellant, as being the property of the deceased his debtor, and liable therefore to the payment of this demand. But, in the meantime, various proceedings had taken place, partly in suits instituted by other creditors, and partly in suits in which Beglar himself was a party; in which the Court had so dealt with this property, that they had held that, *prima facie* at all events, the whole of it

was the property of the appellant, and could be recovered back from her only by suits instituted against her.

When, therefore, Beglar attempted to attach this property as belonging to his debtor Avietie, the Judge before whom the case came held that he was concluded by what had taken place in the former proceedings, and that, although his own opinion was that these transactions were fraudulent, he could not, after what had been determined on former occasions, give effect to that opinion.

From that decision there was an appeal to the Sudder Dewanny Court; and that Court confirmed the opinion of the Sudder Ameen, and expressly referred Beglar to a more regular proceeding to give effect to his claim.

Now, if he had thought fit to pursue that course, the real question between these parties would have properly come on for trial.

That instruments to the effect stated had been executed, appears to their Lordships to admit of no reasonable doubt; but considering the nature of the relation subsisting between these two parties, Avietie and his mistress; considering the situation in which this lady appears originally to have been placed—that of a slave girl; considering the pecuniary difficulties, at all events, which seem at different times to have pressed upon Avietie, undoubtedly the nature of these transactions, as real transactions of bargain and sale, purchases for considerations actually paid, were open to great doubt; and those doubts would have been solved, and the whole facts of these transactions would have been investigated, had Beglar thought fit to prosecute a suit for that purpose as a creditor of Avietie. And if he had prosecuted a suit in that character, what would have been the effect? Would it have been that he would have recovered the whole of this property against this lady? Supposing he had substantiated his case, the effect would have been this—that as against his debt, as against his claim, these transactions could not have been maintained; but the moment his debt was satisfied, the moment the amount of these two judgments had been satisfied, the remainder of the property would have remained in the hands of the appellant, subject only to similar claims by persons who could make out a similar case against it as creditors of Avietie.

For some reason which it is extremely difficult to understand, to which it is hardly possible to attribute any fair motive, the course which this gentleman thinks fit to take is this: He has established a demand which clearly was a demand against Avietie the father; but the judgments are worded in terms which seem to constitute a personal liability on behalf of Gabriel, and therefore in the year 1842, I think, he brings an action in the Supreme Court against Gabriel, for the purpose of making him personally responsible to the judgments which had been obtained in the Sudder Court, and which clearly ought only to have bound the assets of the father, or to have bound the son to the extent to which he had either possessed or neglected to possess the property of the debtor.

That action was tried on the 11th of February 1842, and the only notice we have of what took place on that occasion is in a short note at page 137 of the Appendix, by which it appears that a simple verdict was taken against the defendant, without reference to his being executor. Upon that verdict the interest and principal are taxed, and the whole amount is found to be 10,159 rupees. Upon that, judgment was entered up. But here again we have no evidence of what the contents of that judgment were.

Under an execution issued upon the judgment, it appears that property alleged to belong to Gabriel, including the property which had been conveyed by the father to the appellant, were put up to sale in several lots. One of these lots consisted of "the right, title, and interest of Gabriel Avietie Ter Stephanoos in a portion of a talook near Dacca;" and Mackeetar Vardoon became the purchaser for the sum, I think, of 20 rupees.

He became the purchaser also of other lots; whether the price was equally nominal I do not know; but I think it somewhere appears that about 1,500 rupees

were paid for the whole of those estates. By a Bill of Sale, executed by the Sheriff on the 26th of June 1843, it is recited that a writ of *fiery facias* was issued out of the Supreme Court of Judicature at Fort William, dated the 4th of April 1842, whereby the Sheriff was commanded to levy upon the houses, lands, debts, and other effects, real and personal, of Gabriel Avietie Ter Stephanoos in the said writ named, to a certain amount therein mentioned, and to have that money before the Justices of the Supreme Court of Judicature on the said 15th day of June, to render to Beglar, in the said writ also named.

It then recites that the Sheriff, by virtue of the said writ of *fiery facias*, did seize "the right, title, and interest of the said Gabriel Ter Stephanoos, of, in, and to (amongst other property) all that four annas, six gundahs, and two crantees, share of a talook situate, lying, and being at Roope Gunge, in the district of Dacca;" that, under a writ of *venditione exponas*, this property was put up to sale, and that Mackeetar Vardoon was the highest bidder for the same at the sum of 20 rupees; and then the Sheriff "doth as much as to him lies, and he can or may, both at law and in equity, bargain, sell, assign, and transfer to the said Mackeetar Vardoon the rights, title, and interest of the said Gabriel Ter Stephanoos in this estate." Similar deeds were executed as to the rest of the property.

On the 12th of December 1843, (that is, about six months after the date of this conveyance) the present suit was instituted in the name of Vardoon, as purchaser of the interest of Gabriel Ter Stephanoos in these estates, and Gabriel Ter Stephanoos and the present appellant, who was in possession of the property, and had been in possession of it for a period of fifteen years, and Beglar, were made defendants. That case came on to be heard before the Sudder Ameen on the 28th of November 1844. He was of opinion that all these transactions which had taken place between Avietie and the appellant were fraudulent, as made with the intention of defeating the creditors of Avietie, and he pronounced a decree in favor of the plaintiff in that suit. The case was carried by appeal before the Sudder Dewanny Court; and that Court, by a majority of two Judges against one, confirmed the judgment, and against that judgment the present appeal is brought. There can be little doubt that Beglar was the real purchaser of these estates in the name of Vardoon, and Vardoon having died pending the proceedings, Beglar on his death became his representative, and revived the suit in that character as plaintiff.

Now, it is not very clear, upon the terms of this decree, what it was that the Court intended to give to the plaintiff by the effect of its order. The terms of it are: "It is, therefore, ordered that the plaintiff's claim be decreed in this case, and that the plaintiff take possession of 4 annas of the share of this talook, and all the other property set forth in the plaint, together with the wasilat (which I suppose is the rent) from May 1844, the day of the purchase, to the date of the possession."

Now, the first objection which is made to the decree which has been thus pronounced, is thus: It is said the property which is sought to be recovered in this suit was originally the property of Avietie; you must, therefore, show first that Avietie on his death, by some means or other, passed this property to Gabriel, either as his heir, or by devise, or in some other form, and you do not show any mode by which any interest whatever in this property, which belonged to Avietie at the time of his death, could become vested in Gabriel. But it is said further, "If you do show that the property become vested in Gabriel, the next point which you have to make out is this—you must show that the property of Gabriel has become vested in the present plaintiff, Beglar; and you cannot show that, because the interest of Gabriel, if he had any interest, was such as was not capable of being seized or sold under a writ of execution from the Supreme Court." And they say further, "Supposing these difficulties to be out of the way, Gabriel can claim, under the father, only as a mere volunteer; you can claim only in the same right, as being in the same position in which Gabriel himself claimed, if these deeds were

good against Gabriel they are good against you. If he could not impeach these transactions, neither can you."

Now, upon the first point, that is to say the transmission of interest from Avietie to Gabriel, the case seems to stand thus: It is admitted that Gabriel, although the son, was the illegitimate son of Avietie, and was not the heir of his father, and in that character, therefore, could not take this property. But then it is said there was a Will, which was made by Avietie, in February 1835, a few months before his death, under which Gabriel became the general legatee and devisee of the whole of the testator's property, subject to the charges which were created by that Will. It is said on the part of the appellant that that Will was not properly in evidence: for that, although a Will was produced (or rather an official copy of a Will was produced) there was no examination of witnesses, and though that Will had been proved, as to the personal estate, by Gabriel, that would be no evidence against the appellant; at all events, it would not affect the real estate.

If it were necessary to decide that question, their Lordships would be inclined to hold that the Will was sufficiently in evidence for the purposes of this suit. The Regulation provides that where documents are produced, and they are not disputed, they shall be received without proof.

As to the pleadings on that subject, the case, I think, was this: The appellant, when called on to answer as to the *factum* of this Will said: "What does it signify if there is such a Will? If such a Will be produced, it cannot have any effect against my interest." An official copy of the Will was produced at the hearing, and there does not appear to have been any objection taken to the reception of that instrument, or any demand made on the part of the appellant that the instrument should be regularly proved by witnesses. If, therefore, it were necessary to determine that point, their Lordships would be of opinion that the Will was, for the purposes of the suit, as against the appellant, sufficiently established.

Then, it is necessary to look to what the nature of that Will is, in order to see whether it is of such a character as that it would pass to Gabriel the legal estate in this property, in a form in which it could be the subject of seizure under a writ of execution from the Supreme Court, as the law at that time stood.

The Will in substance is this:—The testator declares that his son Gabriel shall be his heir and executor for the purpose of executing the intentions of his Will; and thereby, no doubt, he became a trustee for the purpose of executing the different dispositions contained in that instrument. Those dispositions were to this effect:—There was first a charge by way of annuity of 1,200 rupees in favor of the present appellant, all the debts were to be paid, there were very large legacies to be discharged, and after all these charges, debts, legacies, and annuities had been satisfied or provided for, as to the remainder of the estate Gabriel was to be tenant for life with remainder to his sons. He, therefore, was entitled to no thing for his own benefit, but a life-interest in the residue of the real and personal property of the testator after all the charges upon it had been satisfied and provided for, after a full administration had taken place of the assets for the purpose of discharging these several dispositions.

Now, was that an interest which could be sold under an execution issued in the Supreme Court against the property of the testator? We have the concurrent opinion of the two very highest authorities in this country on the subject, Sir Edward Ryan and Sir Lawrence Peel, who are most clearly of opinion that no such interest could pass under such an execution, and that therefore the conveyance under it was absolutely null and void. Indeed, the grossest injustice would be done if the transaction, as it has taken place here, could stand. For what is the effect of it? The effect of it is merely this—that there being some uncertain rights in some uncertain property in the province or city of Dacca, at a distance from Calcutta, it being uncertain whether the property is worth 1,00,000 rupees, or whether the interest of the debtor is worth anything, that property is put up for sale (that is the right and interest of the debtor in that property is put up for sale) in

Calcutta, and I think it appears here to have been bought for mere nominal sums, it being utterly impossible that there could be any satisfactory means of determining the value or procuring a fair price by the competition of purchasers acquainted with the value; or capable even of ascertaining the value of the property. But beyond that, the effect of it is this—that for these nominal considerations the purchaser is to obtain the whole of this property; although supposing all these deeds to be void, against creditors of Avietie, the very utmost that ever could have been demanded against this lady out of this property by this suit would have been the amount of the debt originally due from Avietie, and properly recoverable against his assets.

Now, the fact that the Bill of Sale was void and passed nothing to the purchaser would alone be sufficient to dispose of this case; but as it was not the ground on which the Court below proceeded, it will be more satisfactory to advert to the other grounds. The other grounds are these: although these instruments are open to suspicion, they are open to suspicion at whose instance? They are open to suspicion as between the creditors of Avietie and the appellant. They are open to no suspicion at all as against the creditors of Gabriel. Gabriel is a mere volunteer. Gabriel's creditors might well dispute any fraudulent assignment which Gabriel had made; but how can Gabriel's creditors, or a purchaser from Gabriel, dispute the validity of transactions which Gabriel, before the institution of this suit, and long before the institution of the suit in which the present claim was established (that is, before the institution of any suit in the Supreme Court), had recognized and abundantly confirmed? And, therefore, even if these different objections to which we have adverted, in respect of the form of the suit, and the nature of the proceedings, were removed, the character of the plaintiff—the character in which he sues of a personal creditor asserting a personal liability against Gabriel—would effectually exclude those considerations upon which, and upon which alone, the transactions which are now disputed could be subject to question.

Their Lordships, therefore, are very clearly of opinion that the judgment which has been pronounced must be reversed.

It appears to their Lordships that this has been not only a most irregular proceeding, but that it is impossible to attribute it to any fair motive; we heard none, at least, assigned at the Bar for the course which had been taken. A most unfair advantage would have been gained if these decrees could have been maintained.

Their Lordships, therefore, are of opinion that the appellant is entitled not only to have the decree reversed, but to have the costs re-paid to her, which, under the decrees of the Courts below, she has paid; to have her costs of those proceedings, and, also, to have her costs of the present appeal. If there be any means by which this gentleman, Beglar, can now revert to his original position as a creditor of Avietie, and in that character dispute these different gifts or sales, of course it will be competent to him to do so. If not, by attempting to obtain an unfair advantage in an irregular manner, he will have lost the opportunity of which at one time he, no doubt, might have availed himself.

The 17th July 1856.

Present :

The Judge of the High Court of Admiralty, the Chancellor of the Duchy of Cornwall, Sir E. Ryan, and Sir L. Peel.

Jurisdiction (Supreme Court of Bombay, Ecclesiastical side)—Conjugal Rights (Restitution of)—Parsees.

On Appeal from the Supreme Court of Bombay.

Ardaseer Cursetjee,

versus

Perozeboye.

The Supreme Court of Bombay on its Ecclesiastical side declared incompetent to entertain a suit for the restitution of conjugal rights at the instance of a Parsee wife against her husband.

THE present question arises upon an appeal from the Ecclesiastical side of the Supreme Court of Bombay, which Court had overruled a protest against its jurisdiction; and their Lordships will have to determine whether, under all the circumstances, the judgment ought to be maintained, or the appeal allowed.

The suit in the Court below is a suit for the restitution of conjugal rights, and such is clearly its character, though some of the averments in the suit, and a part of the prayer made, are different from what would be made or admitted in the Ecclesiastical Courts in this country.

The parties are Parsees, natives of the Island of Bombay, and there resident. Their religion is that of Zoroaster. The wife brought the suit. The husband, in a protest, after the libel was given in, denied the jurisdiction of the Court, and contended that it was incompetent to take cognizance of such a suit. The Chief Justice was of opinion that the protest ought to be overruled, thereby, in effect, deciding that the Court might proceed to administer justice in such a suit between the parties. The Puisne Judge dissented. According to the Charter of the Supreme Court, judgment was given in accordance with the opinion of the Chief Justice.

The language of the Clause of the Charter granting Ecclesiastical jurisdiction is as follows :—

“And it is our further will and pleasure, and We do hereby, for Us, Our heirs and successors, grant, establish, and appoint that the Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, and shall have full power and authority to administer and execute within and throughout the Town and Island of Bombay, and the Factories subordinate thereto, and all the territories which now are, or hereafter may be, subject to, or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subjects as aforesaid there residing, the Ecclesiastical Law, as the same is now used and exercised in the diocese of London in Great Britain, so far as the circumstances and occasion of the said Town, Island, Territories, and people shall admit or require; and to that purpose We give and grant to the said Supreme Court at Bombay full power and authority to take cognizance of, and proceed in all causes, suits, and business belonging and appertaining to the Ecclesiastical Court before the said Supreme Court of Judicature at Bombay, in whatsoever manner to be moved, as well as at the instance or promotion of parties as of office, mere or mixed, against any of the said subjects residing in the said Town, Island, Territories, or Districts, and which by the law and custom of the said diocese of London are of Ecclesiastical cognizance, and the said causes, suits, and business, with their incidents, emergents, and dependents, and whatsoever is thereto annexed and therewith connected, to hear, despatch, discuss, determine, and also to grant probates under the seal, &c., of the last Wills and Testaments of all or any of the said subjects of Us, Our heirs and successors, dying and leaving personal effects

within the said Town, Islands, Territories, or Districts, respectively, and of all persons who shall die or have effects within the places aforesaid."

Such being the jurisdiction conferred by the above Clause upon the Supreme Court, we must next consider the objection which has been raised to the exercise of that jurisdiction in this case. The especial reason assigned against the Court taking cognizance of this case, as set forth in the protest, is that the parties are Parsees, professing the religion of Zoroaster, born in the Island of Bombay, natives of India, and are not persons who, prior to the date of the Letters-Patent establishing the Supreme Court, have been described in the Royal Charter of Justice, by the appellation of British subjects,—that the Court is incompetent to take cognizance or to proceed in this suit, or administer to the parties the Ecclesiastical Law as used and exercised in the diocese of London.

It is quite true, as was argued at the Bar, that the reason assigned for the incompetency of the Court to exercise jurisdiction is, that the parties to the suit are not British subjects within the meaning of the Charter, and that the general averment of incompetency had reference to that reason; but we think that in a case of this description, where the question substantially is, whether the Court has jurisdiction to entertain the suit, or, to state the case more accurately, whether from the peculiar nature of the subject-matter this case is not excepted from the general Ecclesiastical jurisdiction conferred by the Charter, it is our duty to look at the whole record and give judgment accordingly. If it be apparent on the face of the record that the suit is not maintainable, we think that there is enough in the protest to require us to express our opinion, though that protest may not have been intended to direct our attention to more than one particular objection.

Proceeding upon this principle we will assume for the moment that the parties to this suit are properly described and distinguished by the appellation of British subjects, and address ourselves to the question what, with reference to the facts of the case, is the proper meaning of the words, the "Ecclesiastical Law, as the same is now used and exercised in the diocese of London, so far as the circumstances and occasion of the said Town, Island, Territories, and people, shall admit or require." This enquiry, then, is, whether the circumstances and occasion will admit or require the application of English Ecclesiastical Law in this instance.

We must remember that the English Ecclesiastical Law is founded exclusively on the assumption that all the parties litigant are Christians; indeed originally, more strictly speaking, Christians professing the doctrine of the Church, and that till of late days, the only mode of enforcing the decrees of Courts Christian was by process of excommunication, the imprisonment which followed taking place under the authority of the Civil Courts. Excommunication in ordinary cases is now superseded; instead of that proceeding, the Ecclesiastical Courts pronounce the party to be in contempt, and signify the same to the Court of Chancery, which issues the authority to imprison.

It is true, however, that a considerable part of the jurisdiction of the Ecclesiastical Court is in its nature, though not in its origin, purely Civil, and has no proper connexion whatever with any religious matters. We advert to the grant of probate and administration.

Our proper enquiry is whether, with reference to the limitation in the Charter, "as far as the circumstances and occasion of the said people shall admit or require," it is consistent with that limitation for the Ecclesiastical side of the Supreme Court to entertain a suit for the restitution of conjugal rights at the instance of a Parsee wife against her husband?

We must consider the nature of such a suit, the steps which must or may be taken in it, and the consequences which may arise from any decree which may be pronounced in it.

In such a suit the first step may be to try the validity of a Parsee marriage, and thought his might be a task of no small difficulty, yet, perhaps, it might be

practicable to determine such a question by Parsee Law, if it be competent to a Court Christian to take cognizance of the Parsee Law for such purposes. We are aware that, under particular circumstances, the Ecclesiastical Courts in England have exercised jurisdiction with respect to Jewish marriages, ascertaining their validity by Jewish Laws; but the very great difficulties attending such investigation, and the almost absurd consequences to which they lead, would not induce us to follow those precedents further than strict necessity requires.

Assuming, however, the validity of the marriage to have been tried and established, the next step in a suit for the restitution of conjugal rights in the Ecclesiastical Court, if there be no defence, is to order the husband (assuming him to be the party proceeded against) to take his wife home and treat her with conjugal affection; and if he refuse, to pronounce him in contempt, the consequence of which is imprisonment.

The husband may defend himself by alleging and proving his wife's infidelity or cruelty.

The Ecclesiastical Court has no power to decree alimony, except *pendenti lite*, or after a decree for separation by reason of cruelty or adultery. It is wholly contrary to the first principles on which the Ecclesiastical Courts proceed, to allow alimony under any other circumstances: for the Ecclesiastical Court cannot contemplate any separation of husband and wife, except where cohabitation is prevented by adultery, or rendered impracticable by cruelty. Under all other circumstances, a separation is, by Ecclesiastical Law, unlawful. It follows, therefore, if the wife succeed in a suit for the restitution of conjugal rights, the sole remedy is to compel the husband to take her home.

It appears in this case that the husband has gone through the form of marriage with another woman, with whom he is cohabiting. He, therefore, either has another wife, lawful by Parsee Law, or he is living in adultery.

Is it possible that, in either of these two cases, the husband can, by the Ecclesiastical Law, as it prevails in the Diocese of London, be directed to take his wife home? In England, the wife, on account of such an intercourse, would be entitled to a separation from bed and board, and alimony; but a prayer for restitution is, under such circumstances, wholly unheard of. A Court Christian cannot enforce a renewal of cohabitation with an adulterer or adulteress; such a proceeding would be utterly repugnant to its character, its practice, and its principles. Such a decree would not be the administration of Ecclesiastical Law, but the violation of it.

What might be the remedy by Parsee Law, we think it wholly unnecessary to enquire, because, from the religion the Parsees profess, it cannot be the remedy the Court Christian would afford; nor would such relief be administered by Ecclesiastical Law.

There are, however, other difficulties. The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahommedan Law to Mahommedans, Hindoo Law to Hindoos; but the Ecclesiastical Law has no such flexibility. Change it in its essential character, and it ceases to be Ecclesiastical Law altogether.

For the reasons we have stated, we think that a suit for the restitution of conjugal rights—strictly an Ecclesiastical proceeding—could not consistently with the principles and rules of Ecclesiastical Law, be applied to parties who profess the Parsee religion: but we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them. We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description. It may be that such laws and customs do not afford what we should deem, as between Christians, an adequate relief; but it

must be recollected that the parties themselves could have contracted for the discharge of no other duties and obligations than such as, for time out of mind, were incident to their own caste ; nor could they reasonably have expected more extensive remedies, if aggrieved, than were customarily afforded by their own usages. Such remedies, we conceive, that the Supreme Court on the Civil side might administer, or at least remedies as nearly approaching to them as circumstances would allow. In suits commenced on the Civil side, the peculiar difficulties which belong to the exercise of Ecclesiastical jurisdiction in some matrimonial cases would not arise. Proceedings might be conducted on the Civil side, with such adaptation to the circumstances of the case as justice might require, though, on the Ecclesiastical side, such modification would be wholly irreconcilable with Ecclesiastical Law.

We have been led to make these observations, not merely by general considerations, but more particularly by the case of *Mihirvanjee Nuoshirwanjee*, appellant, *versus* *Aman Bae*, his wife, respondent, reported *Borradaile*, p. 203.

That case shows that the *Sudder Adawlut* of Bombay will take cognisance of matrimonial suits between Parsees, and will afford them such relief as a due regard to their own laws and customs will allow ; it also proves, as indeed must be expected, that those laws and customs are wholly at variance with the principles which govern the matrimonial law of the diocese of London, and incompatible with the Ecclesiastical Law, as in such cases is administered. One instance will suffice. It appears that under many circumstances the husband is permitted to take a second wife, the first being alive.

We have not neglected to observe that, in two or three cases, the Ecclesiastical side of the Supreme Court has not refused to entertain suits of this description ; but we have no reason to think that the difficulties which occur to us were brought prominently before that Court, or that, after duly considering them, the Judges came to the conclusion that they were unimportant. There is no such course of decision as should make us hesitate in giving effect to our own opinion.

We think that the protest should be sustained, and the judgment reversed on the grounds we have stated, and we do not deem it necessary to enter upon a discussion which chiefly occupied the time of the Court below, whether the parties to this suit were or were not persons who, prior to the date of the Letters-Patent establishing the Court, were described and distinguished in the Royal Charters of justice by the appellation of British subjects. Whatever may in such respect be their description, our opinion is that this suit cannot be entertained.

The Lords of the Committee will, therefore, humbly report to Her Majesty as their opinion, that the order of the Supreme Court of Judicature at Bombay of 5th July 1854, whereby the protest of the appellant was overruled, ought to be reversed, each party paying his and her own costs of this appeal.

The 1st December 1856.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. Patteson, and Sir L. Peel.

Order of Single Judge of Bombay Sudder Court as to admissibility of a Special Appeal—Appeal to Privy Council—Evidence—Family usage.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Modee Kaikhoosrow Hormuzjee,

versus

Cooverbaee and others.

By Act III of 1843, the decision of a single Judge of the Sudder Court of Bombay as to the admissibility of a special appeal was final so far as the Sudder Court was concerned ; but the Act did not extend to take away the right of appeal to the Privy Council.

Clause 1 Section 27 Regulation IV. 1827 of the Bombay Code imposes no obligation on the Courts to ascertain whether there is family rule or usage, where there is no allegation of such fact in the pleadings, or where the parties have waived resort to the course prescribed by the Regulation.

THIS appeal arises out of a suit instituted by the appellant in the Court of Surat against the respondents, the widow and daughters, and a grand-daughter, of the appellant's late brother, Modee Rustomjee Hormuzjee, for the purpose of recovering the late brother's estate.

By the plaint in this suit the appellant alleged :—

"That my father Modee Hormuzjee Bhimjee departed this life in the year Sumwut 1877. He had three sons: the eldest of whom was Modee Muncherjee, the second Modee Rustomjee, and the third myself, the petitioner Kaikhoosrow. Neither of the other two brothers, but only myself, had sons, and according to the custom of our family, and the rules of our Parsee 'Punchaet' of Surat, the brothers of deceased persons, and not their wives and daughters, are entitled to their inheritance. My elder brother Modee Muncherjee died six years past, leaving his wife, and the certificate of heirship to him has been obtained from the Court by myself and my brother Rustomjee, and we two brothers have received his property.

"My brother Rustomjee departed this life on the 16th August 1849, and, he having no son, I am the owner and heir to all the property of my deceased brother Rustomjee, and all the property has been taken possession of by his widow Cooverbaee, his daughters Dinbaee and Motteebae, and grand-daughter Khursetbaee, which they do not make over to me; but alleging their false claim thereto, by the instigation of some people, they intend ruining the property, with the object of injuring my just claim. Having, therefore, purchased a stamp paper of the value of 2,000 rupees, I prefer my plaint for rupees (6,18,699) six lakhs eighteen thousand six hundred and ninety-nine, to obtain possession according to the following particulars of the property, ready-money, jewels, &c., deeds and other documents, and 'Dufturs,' and I request that Cooverbaee, widow of Modee Rustomjee, Dinbaee and Motteebae, daughters of Rustomjee, and Khursetbaee Buchooabae, grand-daughter of Rustomjee, may be summoned to appear before your Honor from the 'Lower Pale,' and after instituting an investigation by means of witnesses and pleadings, the property, ready money, deeds and other documents, and 'Dufturs,' may be made over to me, according to the following particulars, out of their possession. I will represent further particulars in the supplemental petition, answer, &c. Further, I beg to state, that my said brother has lent money to some people, the documents for which he has caused to be written in the names of his widow and daughters; but that amount belongs to my brother, who was the owner thereof, and the said persons therein named have no claim thereto, but I have."

Then follow the particulars of demand.

The respondents by their answer in this suit stated :—

"Modee Kaikhoosrow Hormuzjee has filed a suit against us for the sum of 6,18,699 rupees on account of the inheritance to the deceased Modee Rustomjee, the answer to which we give briefly.

"That the said plaintiff has unjustly laid a false claim against us, who are females and the rightful heiresses, seeking to intimidate us. On considering the following particulars your Honor will become acquainted therewith.

"Honored Sir, the plaintiff and his brother, the deceased Modee Muncherjee and the deceased Modee Rustomjee, all three brothers, in the year Sumwut 1880 (A. D. 1823), divided the little property of their father between them, and, having executed releases to each other respectively, they separated, and they took their meals separate, and traded separately. Therefore, according to the custom of the world, and the rules of our caste, we, the wife and daughters of the deceased Rustomjee, are his heiresses; and, in like manner, amongst us, the wives and daughters of deceased persons who have separated from their brothers have inherited their property.

"Further, the deceased, Modee Rustomjee above mentioned, made his Will, in Sumwut 1902 (A. D. 1845), appointing us his heiresses and administratrix; by which also, according to the Regulations, our religion, and usage, the suit laid by the plaintiff is clearly false. Besides which, the 'Modeejee's' of our community, the plaintiff, and others, gave a written answer, dated the 5th November 1842, to a question put by the Judge respecting Parsees, wherein it is distinctly written that, if the deceased has not left a Will, and there exists any paternal property, his brother is entitled to inherit the same.

"Honored Sir, by the admission of the plaintiff it is publicly known amongst us, that a person may, by Will, bequeath his paternal property to whomsoever he pleases; and, in this case, the deceased, Modee Rustomjee, after the division of his paternal property, acquired property by his own labor, and also made a Will in favor of us, his wife and daughters; therefore, according to the contents of the answer given by this plaintiff, and the other members of our community, with their signatures thereto, his claim is clearly false.

"Further, many suits have been heard in the Adawluts relative to us Parsees, wherein, although a brother and nephews are living, the Court has decided that the persons in whose names the Wills of the deceased are made, are his heirs; and those heirs of the deceased by

Will have received the inheritance ; and the objections and claim made by the brothers and nephews of the deceased have been rejected. Although this was known, the plaintiff has unjustly laid this false claim, in order to injure us, and cause us improper loss, which will be observed on investigation.

"Further, the plaintiff writes in his petition that his brother, the deceased Modee Muncherjee, died, and he has become his heir. In answer to which we beg to state that Modee Muncherjee above mentioned had no issue, and his wife is insane, therefore she is the same as if she did not exist in the world ; and also the deceased, Muncherjee, made no Will, consequently this statement has no connection with our case. The plaintiff has written wrongfully this false proof.

"Further, after the release was passed as above stated, and after the said deceased Rustomjee, made his Will, the plaintiff, Kaikhoosrow, above mentioned, executed another written release to the deceased Modee Rustomjee, in the year Sumwat 1903 (A. D. 1846), wherein it is distinctly written by the plaintiff : 'I have no claim on account of any inheritance, or in any other manner against you, your heirs, administrators, &c. ; neither have you any claims against me, my heirs, administrators, &c. ; and should either of us prefer any claim whatever against each other, or against our heirs, administrators, &c., the same shall be null and void.' Cherisher of the Poor, by the said release also the plaintiff has no right to lay claim in any way against us who are deceased's legal heiresses and administratrix. Nevertheless he has preferred this unjust claim.

"Further, the list of outstanding debts and property, &c., written by the plaintiff in his petition is mostly false, and, in his claim to the inheritance of the deceased, Modee Rustomjee, he has also unjustly included what is due personally to me, Cooverbaee. But, as above shown, the plaintiff's claim is entirely false and unjust, and it is not necessary to trouble your Honor with mentioning in full all the details in this matter.

"Therefore, we pray that, after taking all the particulars above mentioned into mature consideration, and examination of all the proofs herein mentioned, the plaintiff may be prevented from laying this false claim, and we will afterwards lay our suit on account of the loss which we have, and shall hereafter sustain in consequence of his false claim and objections, and obtain redress. And we will state further particulars at the time of the investigation, and in our rejoinder."

The cause was first heard before the Sudder Ameen of Surat, who, after having examined the case evidently with great care and attention, dismissed the plaint with costs. From this decision, the appellant appealed to the Zillah Court of Surat, by which Court the decision of the Sudder Ameen was affirmed. The appellant then presented a petition to the Court of Sudder Dewanny Adawlut of Bombay, praying for the admission, under Act III of 1843 of the Bombay Presidency, of a special appeal from the decisions of the Sudder Ameen and of the Zillah Court, which petition having been heard before a single Judge of the Sudder Court, according to the provisions of the Act, was rejected by him. The decision of the single Judge was afterwards brought under the consideration of the other Judges of the Sudder Court by a petition of review presented by the appellant, and which was also dismissed.

The appeal before us complains of these four several decisions. In disposing of this appeal it may be convenient first to consider whether the order of a single Judge, dismissing the petition for the special appeal, has been properly made the subject of appeal.

The Act of 1843, which had been referred to, and which has been followed by an Act of 1853, to which reference was also made, contains the following enactments :

"1. It is hereby enacted that, from and after the 1st day of May next, a special appeal shall lie to the Courts of Sudder Dewanny Adawlut at Calcutta and Allahabad respectively, to the Court of Sudder Adawlut at Madras, and to the Court of Sudder Dewanny Adawlut at Bombay, from all decisions passed on regular appeals in the Civil Courts subordinate to them respectively, which shall appear to be inconsistent with some law or usage, having the force of law, or some practice of the Courts, or shall involve some question of law, usage, or practice upon which there may be reasonable doubts.

"IV. And it is hereby enacted, that every application for a special appeal, duly presented to the proper Court as aforesaid, shall be heard by a single Judge of the Court, in the presence of the special appellant, or his vakeel or agent ; and it shall be competent to the Judge, at his discretion, to call for and peruse any document forming a part of the record of the cause, and to summon the opposite party to answer the application.

"V. And it is hereby enacted that, if it shall appear to the Judge that a special appeal is admissible under this Act, he shall pass an order accordingly, and shall at the same time reduce

the points to be determined to writing in English, in the form of a certificate, which shall be translated into the vernacular language in use in the Court, and the special appeal shall then be brought on the file of the Court, to be heard and determined in due course: Provided, that it shall not be necessary to call for or refer to any part of the proceedings, and the reading of which is not required for deciding the point or points of law stated in the certificate.

"VI. And it is hereby enacted that, if it shall appear to the Judge that a special appeal is not admissible under this Act he shall reject the petition, and his order, so rejecting a petition for a special appeal, shall be final.

"VII. And it is hereby enacted that, in every case of special appeal admitted as aforesaid, the Court of Sudder Dewanny Adawlut shall determine the point or points certified as above enacted, and no other point or part of the case whatever."

By this Act of 1843, therefore, the decision of a single Judge, as to the admissibility of a special appeal, was made final, and, no doubt, the Act has rendered it final, so far as the Sudder Court is concerned; but it is a wholly different question whether the Act could extend to take away the right of appeal to Her Majesty in Council. It is the prerogative of the Council to do justice between all its subjects, and the Indian Legislature could have no power to limit or affect that prerogative without the sanction of the Crown, which does not appear to have been given. The finality created by the Act must, as it seems to their Lordships, be limited by the jurisdiction of the Legislative power which created it, and their Lordships are, therefore, of opinion that the order of the single Judge, rejecting the special appeal, has been properly made the subject of appeal. That order, however, forms only one of the subjects of this appeal. The appeal goes far beyond it; it extends to the decisions of the Zillah Court and of the Sudder Ameen, and it is plain that this case admits of different considerations, if it be looked at with reference only to the decision of the single Judge from those which present themselves if it be looked at with reference also to the previous decisions. In the one case, the question to be considered would be, whether a sound discretion was exercised by the single Judge, and by the other Judges of the Sudder Court, assuming them to have been competent to entertain the subject, in rejecting the special appeal. In the other case, the question would be whether the successive decisions ought to be upheld upon the whole merits of the case. It would be difficult, if not impossible, to deal with the question whether a sound discretion was exercised by the single Judge in rejecting the special appeal without entering at large into the merits of the previous decisions. It would also be an unsatisfactory mode of disposing of this case to deal with it simply with reference to this question of discretion, as the result of so dealing with it might be to remit the parties to fresh litigation.

Moreover, the most favorable view of this case for the appellant must be that the question should not be regarded as one depending merely upon the exercise of discretion, and their Lordships, therefore, have determined to decide this appeal with reference not merely to the decisions of the single Judge and of the Sudder Court, but with reference to all the decisions which have been pronounced in the cause. The nature of the case sufficiently appears from the pleadings which have been already stated.

It is hardly necessary to add that, if the Will set up by the answer, be a valid and effectual Will, the appellant's case must be wholly at an end. He claims as heir, and as heir only, and his title as heir would be displaced by the Will. It is to the Will, therefore, our attention must be directed. Now, the *factum* of the Will is not disputed. It is, indeed, proved beyond dispute; but the appellant's case is this: that the testator was a Parsee; that among the Parsees there is a rule or usage that no disposition can be made by Will to the total disherison of the heir, or, at all events, that there was such a rule or usage in the testator's family; that, under the provisions of Regulation IV of 1827, Section 27, Clause 1, it was the duty of the Courts to have ascertained this rule or usage by examining persons versed in the laws by which Parsees are governed; but that evidence on the part of the appellant which would have established this rule or usage was rejected by the Courts.

Three points are involved in this argument on the part of the appellant : 1st. That there is such a rule or usage as the appellant alleges ; 2nd. That under the Regulation referred to, it was the duty of the Courts to ascertain it ; and 3rd. That evidence on the part of the appellant, tending to prove it, was rejected.

As to the *first* of these points, no such rule or usage, as is now insisted on upon the part of the appellant, is in any manner set up by the pleadings in this suit ; there is no replication to the answer denying the validity of the Will upon any such ground. The existence of any such rule or usage is first adverted to in the supplemental petition of appeal from the decree of the Sudder Ameen ; and, indeed, what is alleged in that petition, as well as in the petition to the Sudder Court for the special appeal, is not that the testamentary power of Parsees is limited in the manner now insisted on, but that they have no power whatever to dispose by Will to the prejudice of the heir, which in effect amounts to their having no testamentary power at all, although the existence and constant exercise of the power is notorious, and recognised and well established by authority, and was, indeed, admitted at the Bar.

It is in the petition for the special appeal, too, that we first find the suggestion of the alleged family rule or usage, which it is scarcely necessary to mention, as it rests on no other ground than that some members of the family had died intestate. It was argued for the appellant that it rested upon the respondents to prove the power of the testator to make the Will in question, in order to establish their title under that Will ; but it being admitted that the testamentary power existed generally, it was clearly upon the appellant to show that it did not extend to this particular case, and to allege and prove the limits of the power. He has made no such allegation and adduced no such proof. The appellant, therefore, cannot maintain this appeal upon the ground of the existence of the alleged rule or usage.

As to the *second* point, there does not appear to their Lordships to be any foundation for the argument on the part of the appellant. Whatever may be the duty of the Judge under the Regulation in question, where any particular rule or usage is alleged, as to which any reasonable doubt may exist, and the parties have not waived resort to the course prescribed by the Regulation, and their Lordships are far from considering that in such cases the Judges in India may not well be advised of their own accord to act upon the Regulation, they certainly would not be disposed to discourage such a practice. Their Lordships, at the same time, have no hesitation in stating their opinion to be, that this Regulation imposes no such obligation upon the Judges where there is no allegation of any rule or usage as to which any reasonable doubt can be entertained, which is the case in this instance as to the power of disposing by Will, or where the parties have waived resort to the course pointed out by the Regulation, as they have done in this case. The appeal, therefore, cannot be maintained on this ground either.

There remains, then, only the *third* question, that of the rejection of evidence ; and most certainly if the appellant had succeeded in satisfying their Lordships that any evidence bearing, however slightly, upon the question as to the alleged limit of the testamentary power, had been rejected by the Courts in India, this case must have been sent back for the reception of that evidence.

Justice requires that all the evidence material to the issue which the parties may desire to adduce should be received before the rights of the parties are disposed of, and their Lordships fully adhere in that respect to the principle on which the case in the 2nd Mr. Moore's Reports, cited in the argument, proceeded. But the appellant in this case has wholly failed to satisfy their Lordships that any evidence, bearing upon the question of limited testamentary power, which is the only material question in the case, was rejected by the Courts, or was tendered on his part.

It seems to their Lordships to be clear, from the language of the durkhasts, that the witnesses originally proposed to be examined on the part of the appellant,

were proposed to be so examined as to the heirship only. Looking to that language, and to the issues in the cause, and to what is stated in the petition for the special appeal, they cannot adopt the suggestion of Mr. Leith, that these witnesses were intended to be examined, not only as to the heirship, but as to the title of the respondents as heirs under the Will.

If the appellant had had any witnesses to examine as to the alleged limit of the testamentary power, it cannot be doubted that he would have claimed the right to examine them when the witnesses to the Will had been examined, and the question of reference to the *Modée* of the *Punchayet*, which, under the Minute of the 20th June 1850, to which all parties must be taken to have agreed, was to be the preliminary to the examination of the witnesses, came before the *Sudder Ameen*; but so far from then proposing to examine any witnesses, the appellant then waived the reference to the *Modée*. The single Judge, indeed, in the judgment appealed from, refers to the rejection of some evidence by the *Zillah Judge*. He says:—

“The second question is, whether the Judge was justified in refusing to take the further evidence tendered in appeal by appellant on the question of custom as to inheritance and the validity of the Will. I think he was, for the reasons assigned by him, *viz.*, that the record contained sufficient evidence of the customs of Parsees in the expositions taken from former cases filed in the Lower Courts, and that those expositions were better evidence, because less unbiassed, than there was any hope of obtaining by the examination of witnesses called by the parties.

“There was a mass of documentary evidence before the Court, showing the right in Parsees to devise, and the practice obtaining amongst them of devising their property.

“Indeed, the fact is so notorious that it is difficult to be understood how such a plea as that there is no testamentary right in Parsees could have been set up.

“It has not been alleged that they are prohibited from doing so by any restrictive law.

“On the whole, I think, the Judge exercised a very sound discretion in refusing to take further evidence, the only result of which would have been to prolong the litigation.”

The Judge of the *Sudder Adawlut* here meant to refer to what was alleged in the petition of the appellant before him, in which the appellant sums up his objections as to the rejection of evidence in these terms:

“That, in our caste, the brothers of a deceased dying without male issue are entitled to his inheritance, although the widow, daughters, and grand-daughters, may be living; in order to prove which I presented *durkhasts*, Exhibits Nos. 7, 8, 9, and 10, in the original suit, for the evidence of respectable persons of our caste to be taken, such as *Ardaseer Dhunjeeshaw Khan Bahadoor*, *Jamasjee Bomanjee Bhownguree*, *Nusserwangee Pestonjee Vakeel*, and others, upon solemn affirmation which persons were summoned by the Principal *Sudder Ameen*; but, nevertheless, their evidence was not taken, and my suit, of the value of lacs of rupees, was at once decided, within five months, upon an insufficient investigation. Cherisher of the Poor, if the evidence had been taken of the witnesses in my favor in the Lower Court by the Principal *Sudder Ameen*, and the question in the case been referred to the *Modéejee* and other members of the Parsee community, and their answer received, the custom of our caste would have been quite apparent, that the brothers of a deceased person dying without male issue are entitled to the inheritance, although the deceased's widow and daughter are living. But, unfortunately, my suit of lacs of rupees was dismissed without taking the evidence of my witnesses, and the answer of the *Modéejee* of the community; consequently, I was helpless. But, through the justice of your Honorable Court, I entertain the hope that, should the evidence of the witnesses on my behalf be caused to be taken, and the questions below mentioned be referred to the *Modéejee*, and other members of the Parsee community at *Surat*, and their answers thereto taken, I shall obtain my just rights.”

What was complained of was, therefore, the rejection by the *Zillah Judge* of the proposal for referring the question to the *Modée*, which, of course, it would not have been proper to do, as the appellant had, in terms, waived the reference when the case was before the *Sudder Ameen*.

The appellant's case, therefore, fails upon this third point as completely as it fails upon the other points; and upon the whole case this appeal must be dismissed.

It has not escaped their Lordships' attention that, if they had decided this appeal upon the simple point whether the decision of the single Judge rejecting the special appeal was right or not, and had differed from the single Judge upon that point, the appellant might have been entitled to a further hearing before the *Sudder Court*;

but their Lordships are satisfied that the appellant could not have succeeded in that Court upon the case as it stands, and that it would not, under the circumstances of this case, have been right for that Court to have admitted further evidence; and they do not think it necessary, therefore, to give any final opinion as to the decision of the single Judge, although, as at present advised, they see no reason to dissent from it.

Their Lordships also desire it to be understood that, in what has been said as to the testamentary power of Parsees, they are far from having intended to intimate any doubt as to the extent of that testamentary power, or to give any encouragement to the notion that any such limit, as the appellant has contended for in fact exists. They do not mean in any manner to disturb what has been decided in India upon that subject, and they abstain from giving any opinion upon it only because it does not properly arise, and has not been fully argued in this case.

Their Lordships, therefore, will humbly recommend Her Majesty to affirm this judgment, and to dismiss the appeal with costs.

The 2nd December 1856.

Present :

The Judge of the High Court of Admiralty, Sir E. Ryan, the Judge of the Prerogative Court, Sir J. Patteson, and Sir L. Peel.

Sheriff—Imprisonment (Relaxation of—of Judgment-debtor)—Escape.

On Appeal from the Supreme Court of Bombay.

Stafford Bettesworth Haines,

versus

The East India Company.

If a Sheriff, upon the representation of a debtor's ill-health, takes upon himself, of his own authority, to relax the debtor's imprisonment by letting him reside out of gaol, it is an escape for which the Sheriff is liable to an action for damages.

If the judgment-creditor voluntarily discharges the debtor out of custody, even for a week only, he cannot, by any agreement which he might have made with the debtor, afterwards re-take him, although the debtor may possibly have agreed that, if he does not pay the money within a week, he shall be re-taken.

A debtor removed from prison under a rule of Court, whether with or without the consent of his creditor, and kept in charge of a Sheriff's Officer in a private house, is still in the custody of the Sheriff.

The Sheriff may, without a rule of Court, refuse to allow the debtor to reside out of prison, though the creditor may have consented to it.

When the Sheriff and all parties consent to the debtor being kept in custody in a private house, the Sheriff is liable to an action for escape on proof of want of proper care and surveillance; but it would be a matter of fact for a Jury to consider whether the creditor, being in some measure instrumental to the escape, ought to recover against the Sheriff.

The creditor may, under certain circumstances, or if he feels it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without at all discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place.

Sir John Patteson.—THIS case comes before their Lordships under peculiar circumstances, as, indeed, it came before the Court at Bombay. It should always be remembered that in all cases we must look at the circumstances of the case before us, in order to see whether or not the principles of law are to be strictly applied to the case, or whether there is any relaxation of what are supposed to be the strict principles of law.

A question was constantly argued before the Court of Bombay, and has been argued here, as to what will be the consequence to the Sheriff upon the question of escape; but really that is not the question in this cause. There cannot be the slightest doubt in the world that, if these circumstances had taken place by the authority of the Sheriff, if the Sheriff, upon the representation that the defendant was suffering very severely in his health, had taken upon himself, to make this relaxation of the imprisonment, and had suffered the defendant, accompanied by ever

so many of his own officers, to go and reside in a house of his own, it would have been an escape; nobody doubts that; there is no question at all about it; and why? Because the Sheriff having taken a party in execution under a *capias ad satisfaciendum* is bound to keep him in his gaol, and he cannot make a gaol for himself of his own authority; he is bound to keep him there *in arcta custodia*, in order to enforce payment of the debt; and if he relaxes that *arctam custodiam* at all, so far the pressure to compel the payment of the debt is relaxed also, which the Sheriff has no right to do. Upon that principle it is, that when the Sheriff had suffered a man to go out of gaol, even in the custody of one of his officers, or, as in the case of *Benton v. Sutton*, he had suffered him to go before he was taken to gaol away from the lock-up house in the custody of one of his officers, it was held to be an escape. Whether it was going at large again or not may be quite another question with respect to the mere words "going at large;" but it constituted an escape so far as the Sheriff was concerned, and entitled the plaintiff, if he thought fit, to bring an action against the Sheriff for that escape. Formerly he would have recovered the whole amount; latterly it has been altered, and he would recover damages only; but that is immaterial.

There is, no doubt, therefore, that the Sheriff, of his own authority, could not have done this thing. But, then, look at the peculiar circumstances of the case. The plaintiff in all cases, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the defendant out of custody. If he does discharge him out of custody, I agree that, if it be only for a week, he cannot, by any agreement which he may have made with the defendant, afterwards re-take him, although the defendant may possibly have agreed that, if he does not pay the money within a week, he shall be re-taken. That is decided law; it has been held so; so it stands, and there is no doubt about it.

But the question really in this case is, whether or not the plaintiffs ever did consent to discharge, and ever did discharge, the defendant out of custody. Now, supposing that the defendant was in a bad state of health, as it is said, and supposing that it had arisen from his confinement in the prison, and that he had applied to the Court of Bombay, from which this execution issued, for a rule of Court, and that for the sake of saving his life, or for the benefit of his health, he had been allowed to be taken from the prison and put into some other place, and there kept by some Sheriff's officer, if the Court had thought fit to grant that indulgence, even against the will of the plaintiffs, and had made a rule of Court to that effect, and he had been removed under that rule of Court, and had been kept in the charge of a Sheriff's officer in a private house, can there be the slightest doubt in the world that he would then still have been in the custody of the Sheriff? I cannot conceive that there would have been the slightest doubt of it. They did not apply for a rule of Court, but they did it at once. It is said in the case that the defendant did not solicit it. No, he did not solicit it no doubt, but it was done (and here we have the account of the plaintiffs) upon the representation of the Medical Officer enquiring into the state of the man's health.

Then, what did they do? They write a letter to the Sheriff, and they say that in consequence of the state of the defendant's health, a temporary release from confinement in the gaol itself is essentially necessary, and that "Government is pleased to permit him temporarily to reside outside the gaol, under such surveillance as may prove as little irksome as possible to the prisoner, while consistent with its perfect efficiency." What, does that mean? The perfect efficiency of keeping him in custody; it cannot mean anything else by possibility. Then, what is the letter to the Superintendent of the Police? Why, it recites that same thing, that the defendant has been allowed to be so under surveillance, and directs him also to take care that he does not go out of the island.

This is communicated to the defendant. The defendant in answer verbally agrees to it, and expresses his willingness to avail himself of that permission. But

not only that, he actually writes a letter to the Sheriff, and he says :—" Sir, I shall be grateful for any change, and the consideration for my health is, indeed, most welcome." Then he goes out of the house with a Sheriff's officer, and makes use of this permission, having so written.

Now, really, can any human being doubt but that the object of the plaintiffs was kindness towards the defendant, in consequence of the state of his health? Their object was to keep the judgment, and the writ of *capias ad satisfaciendum* still on foot, and to keep him in the actual custody of the Sheriff; that was their object clearly. A place where his health might be re-established was constituted a special prison for that purpose, by consent, as it were. The defendant agrees to that, and is thankful for it. Then, surely, he must be estopped, as it were (it is a sort of estoppel), from saying that the custody in which he then was, was not the custody of the Sheriff, when both parties intended it to be so, and that in point of law such custody should be treated as the custody of the Sheriff.

There have been some cases lately, in which the question has been raised whether the party has been estopped from taking advantage of any irregularity, even the non-compliance with an Act of Parliament. There was one case before the Court of Queen's Bench very lately, in which the doctrine was carried to a very considerable extent, and yet I think not farther than it may be carried in the present instance. I allude rather to the case of *Tyerman v. Smith* (25th "Law Journal," Q. B., 359), in which the case had been referred to the officer of the Court under the powers of the Statute 17 and 18 Victoria. The award was not made within three months. The time was not enlarged by the Court or a Judge as it ought to have been, or by the written consent of the parties, but then, both parties having gone before the arbitrator after the time had been enlarged, it was held that the party who had consented, by acting at all after the time, was estopped from taking advantage of the non-compliance with the Statute. Just as in another case of *Andrews v. Elliot* (25 "Law Journal," Q. B., 1), which was tried, I think, before Mr. Baron Bramwell, where under the Common Law Procedure Act the parties chose to refer it to a Judge and not to a Jury, but that, according to the Act of Parliament, ought to be done by written consent. It was not done by written consent, but the Court said that, having chosen to act upon the oral consent, the party was precluded from taking advantage of the want of a written consent. So here this defendant must be precluded from saying that he was not in the custody of the Sheriff, where he intended to be, and where they all intended him to be all along, unless there be any strict rule of law which prevents his being so considered as being in the custody of the Sheriff.

Now, something was said about the 22nd of August. On the 22nd of August it seems that there was an order on the part of the Government that the defendant should be taken back to prison, and the Sheriff's officer goes to the house where he is, for the purpose of re-taking him, and taking him back to prison. When I say re-taking him, I mean taking him back to prison,—because the contention is that he was always in the custody of the Sheriff; that he was always taken, as it were, and continued taken,—but bringing him back to the gaol at Bombay. It seems that in the case on the part of the appellant it is stated that the wife resisted it, and said that they considered that he was not legally in custody at all. On the part of the respondents the case states that the wife alleged her husband to be in a very bad state of health indeed, and that it would be dangerous to remove him, although she did also allege that they did not consider him to be in the custody of the Sheriff at all. The deputy Sheriff, on account of what he considered to be the state of the man's health, did not act upon that order, and remained quiet, the peons—the Sheriff's officers—still continuing about, just the same; they never had notice to retire, or were warned off at all, or told to go about their business by the defendant; but he continued in this house with these officers until the end of December, and then he was taken back. Then it is said that it may be

considered that, on the 22nd of August, he revoked his consent, as it were, and that from that time he had a right to say that he was at large. But be it observed that the custody, such as it was, and the Sheriff's officer keeping that custody, remained just the same after the 22nd of August and till the 3rd of December; there was no voluntary escape permitted by the Sheriff. It was not the intention of the Sheriff to let him go, or to be in any different kind of situation from what he was before, nor was it the intention of the respondents, nor, as far as I know, the intention of the appellant; therefore he was so detained from the first to the last under this agreement.

It is said that if parties can make such an agreement as this to substitute one place of imprisonment for another, the Sheriff will be placed in a very unfortunate situation, and may be liable for an escape in a very different manner, and under very different circumstances from what he would be if the prisoner continued in the gaol itself, and that is very true. If the Sheriff had it communicated to him by the plaintiff that he was inclined to grant this indulgence to the prisoner, and that he might go to another house in the custody of the Sheriff's officers, I am not at all prepared to state that the Sheriff might not say, "I will not do any such thing; I have him here under a *capias ad satisfaciendum*, and, unless you have a rule of Court for the purpose, I shall not consent to any such thing, because I cannot have the same strict custody over the party, and the means of keeping him in custody at another house—at this substituted prison, as it were—that I have when he is in gaol, and therefore I will not consent to anything of the sort; if you mean to take him, discharge him; you have authority to do it yourself, and take him yourself; make your agreement as you please with him; I will have nothing to do with it." Still the Sheriff may consent to do it; the Sheriff did consent to do it, and all parties did consent to do it. I apprehend that the Sheriff, when the defendant was in this private house with all his officers about him, might be liable to an action for escape if it appeared that he had not used proper care, that he had removed his peons, or had employed persons who had not taken sufficient care and watched to prevent the prisoner from escaping. Still it would be, under all the circumstances, for a Jury to consider whether the plaintiff being in some measure instrumental in it, he ought to recover against the Sheriff at all; it would be a question of fact, to be decided under all the circumstances of the case.

Now, really, under all these circumstances, the authorities which have been cited do not appear to bear distinctly (I do not mean to say that they do not bear indirectly) upon the case in question; and I feel that the Chief Justice at Bombay was perfectly right in saying that he had not been able to find any authority, and there is no authority for saying distinctly whether there could be such an arrangement as this or not. He says:—

"I have not, however, been able to find any case in which it has been actually decided that the plaintiff may relax the rigour of imprisonment, without thereby entitling the defendant to his discharge. In the absence of authority, therefore, we must be guided by the general principles of the law."

It is perfectly true that there is no case, as far as I know, which goes to this particular point; but there is nothing to show that it is contrary to any principles of law that the creditor and the debtor may agree. The creditor may, under certain circumstances, or if he feels it to be really material and important to the debtor, change the place of imprisonment, and relax somewhat the rigour of imprisonment, without at all discharging the debtor from his debt, it clearly not being the meaning of either party that any such discharge should take place.

I should say that this opinion must not be taken to go the length of supposing that it would be possible, for instance, for a plaintiff, to say to a defendant: "Oh, you may go about just where you please, but it shall be considered that you are in custody;" because that would be a fallacy and an absurdity: but here was an actual removal from one house to another, and an actual custody of some sort continuing,

which was intended to continue as a custody *bond fide*, as far as we can judge from all the circumstances of the case.

Under these circumstances, we think that the judgment of the Court below is very good, and very clear, and very right; that there is a distinction between the duty of the Sheriff to keep a man *in arcta custodia*, and the question whether or not any act of the plaintiff has been such as to discharge the prisoner. They are totally different questions, and here there is clearly no intention to discharge the prisoner; there is no act done by the plaintiffs which, in point of law, necessarily operates to that effect. It was not the intention of either party that he should be discharged, it was a matter of indulgence and of kindness to him, and certainly he does not appear to have made a very grateful return for it. However, if in point of strict law he is entitled to be discharged, and the debtor is so discharged by the plaintiffs, the law must take its course, whether he is grateful or not grateful, or whether it is a gracious proceeding or not a gracious proceeding. There is nothing in the principle of the law to prevent this from being clearly a continuing custody of the Sheriff by the arrangement of the parties, and, therefore, we think that this appeal must be dismissed, and, of course dismissed with costs.

The Lords of the Committee will, therefore, humbly recommend as their opinion to Her Majesty that the judgment of the Supreme Court of Judicature at Bombay of 3rd of January 1865, ought to be affirmed, and this appeal dismissed with costs.

The 7th February 1857.

Present:

Lord Justice Knight Bruce, the Chancellor of the Duchy of Cornwall, Sir E. Ryan, Lord Justice Turner, Sir J. Patteson, Sir W. H. Maule, and Sir L. Peel.

Limitation—Adverse Possession.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

John Cochrane (Official Assignee),

versus

Hurrosoondery Debia and others.

Suit by the Official Assignee of a deceased insolvent to recover a talook conveyed (several years before his insolvency) by the insolvent, who was, sole or chief acting executor of his father-in-law's Will, as a security for his own debt to his father-in-law, not to any other person in trust for the benefit of any parties who might be entitled to the estate, but to the insolvent's wife who was the tenant for life of the residue. HELD that, in the absence of any proof of fraud, the widow's continuous and adverse possession for more than 12 years barred the suit.

Lord Justice Knight Bruce.—THIS appeal arises upon a suit instituted in the Zillah Court of the 24-Pergunnahs near Calcutta in the year 1853, as the respondents say, or substantially in the year 1851, as the appellants contend, but unquestionably not before the year 1851. The nominal or apparent plaintiff, with whom for the present I shall deal as the substantial plaintiff, was Mr. Cochrane, the appellant, suing as the Official Assignee of the estate of an insolvent Banian named Gourichurn, who had become an insolvent as long ago as the month of December 1833, and whose death followed shortly afterwards, happening in the month of February 1834; many years, therefore, before the institution of the present proceedings.

The object of the suit was to recover a talook called Durgapore, which formerly, many years ago, had been the estate of the insolvent; the suit was instituted against the widow and some at least of the children and descendants of Gourichurn, who were, or one of whom, namely, the widow, was, in possession of the property. The widow certainly was the person in possession; she had been in possession continuously and adversely for a period of much more than twelve years next before the institution of the suit, whether that institution is considered to have been in 1851 or in 1853; which circumstance was of course under the

Regulations of 1793 and 1805 a bar to the suit complete and effectual, unless the plaintiff could bring the case within one of the exceptions against that bar which the Regulation of 1805 provides. That exception was alleged by the appellant in the shape of dishonesty and fraud. The appellant contended that the possession having originally been, and having continued to be, of such a character, he was out of the influence of the Regulation; and, having so delivered himself from the Regulation, he then contended that the apparent instruments, the apparent conveyances, by which the original title of Gourichurn had been defeated, were all fraudulent, and therefore void. Such were the questions that were debated upon the pleadings and evidence before the Zillah Court; the Sudder Ameen in that Court decided both questions against the plaintiff, the appellant, and dismissed the suit with costs. The plaintiff appealed to the Sudder Court, and the case having been heard, and as it seems fully heard, there, one of the three Judges of the Court who heard the case was of opinion in favor of the appellant upon both points, and therefore in favor of his title to succeed; the other two Judges, for different reasons, agreed in the conclusion of the Zillah Court; and the consequence was that the appeal was dismissed, and, I believe, dismissed with costs.

That circumstance has brought the appellant hither, and we are now to consider the validity of his claim.

The possession being, in form as well as effect, admitted, the first question for decision is as to the manner in which the possession of the chief respondent originated, and the character of that possession. The account which she gives of the matter is this,—she was the daughter of a Banian named Chuckerbutty, who appears to have died possessed of no inconsiderable wealth; he made his Will, by which, after giving certain legacies, he gave a life-interest in the residue of his property to her. Unfortunately, he had selected his son-in-law, her husband, Gourichurn, as one of his executor, and, therefore, substantially, he was one of the trustees. And this individual seems to have been allowed to be the sole acting, or chief acting, executor; he appears to have possessed himself of considerable assets of the deceased, independently of his own bond for 18,000 rupees, and a fraction, upon which it is clear, on the evidence, that he was indebted to the testator. The exact amount of the debt of the son-in-law, the acting executor, to the estate, may be matter of fair contention; but that it was considerable—that it must in any event have exceeded the amount of 20,000 rupees—is a matter upon which no reasonable man, upon the materials before their Lordships, can by possibility doubt.

In this state of things, a security, not one of great formality, but prepared in the office of respectable Solicitors, was prepared in the English form. In one sense, it may be said to have the shape of an absolute conveyance; but taking the whole together, their Lordships see upon the face of it that it was intended as a security. By it several portions of the landed estate of Gourichurn, including the talook in question, were, in consideration of a debt of 47,000 rupees, stated to be the amount which he owed to the estate, conveyed, not to any person in trust for the benefit of any parties who might be entitled to the estate, but, singularly enough, to the wife herself, who was the tenant for life of the residue. It seems remarkable that the instrument should have been prepared in such a shape by Messrs. Collier and Bird who are described, and no doubt accurately described, as highly respectable Solicitors at Calcutta; but so it was.

Shortly afterwards it seems to have suited some arrangement of the husband that a change should be made; and, in circumstances which perhaps do not clearly appear, a part of the property was withdrawn from the security; the wife was treated as having received 20,000 or 27,000 rupees of the 47,000 rupees, which it is probable enough she never did receive; and a second mortgage deed, in April 1831, was taken in her name for the reduced amount, in all substantial respects much as the former had been.

Now, if the matter had rested there, and the instrument of 1832, upon which so much stress has been laid throughout the cause, and therefore in the argument here, were out of the question; it appears to their Lordships, upon the evidence, that the validity and good faith of these transactions would not have been successfully impeached or affected. As I have said, there is every reason to believe, indeed to be satisfied, that the amount of debt due from Gourichurn to the estate was considerable: it could not have been less than 20,000, and it may by possibility have amounted to 47,000 rupees. There may not, or may, have been an intention upon the part of Gourichurn to give a preference to the wife over his other creditors; but if that was his intention, it does not necessarily invalidate the instrument. It is not proved that there was any contemplation of insolvency; and the transaction of April 1831 was not merely more than two months before the insolvency, but it was more than two years, the insolvency not having taken place, as I have already said, until the month of December 1833. The suit was not to redeem her as a mortgagee; the suit was one impeaching her title for fraud; nor as a suit for redemption has it been treated by the appellant, because it has been in effect stated on his part at the Bar, that, if the transactions of 1831 are considered as forming a good mortgage, it would not be worth the while or money of the appellant to redeem, a statement at which one is not surprised, when one sees that the valuation of the talook in the plaint is 12,000 rupees and a fraction; and even considering that as under the true value, we cannot possibly place the value of the talook higher than the amount of the security upon it.

It has been said that all this was a mere delusion, mere fraud, for the purpose of cheating the creditors of Gourichurn. Their Lordships are of opinion that the evidence affords no ground in support of such an allegation. Independently of the side on which the burden lies of supporting such an allegation, independently of any consideration of that kind, even if the burden had been upon the widow to support the fairness of these transactions, their Lordships are of opinion that they would have been supported, especially considering the great length of time that has elapsed since 1831, without laying too much stress upon the deaths of persons who have died in the interval.

This case, therefore, would have been clear of all difficulty, but for two circumstances: one the transaction of June 1832, and the other the judgment of the Supreme Court, which has been with propriety so often mentioned during the argument.

Now, over the transaction of June 1832, there seems to hang some mystery. Their Lordships are not perfectly satisfied with any account which has been given of it. The question, however, is whether it affords evidence of fraud sufficient to impeach the prior transactions of 1831. And their Lordships think that it does not. Whatever may have been the reason which induced those who were parties to that transaction to treat the talook in question as valued at 8,000 rupees, to make a sale of it at that value to the person for whom Nilmoney Mutty Loll took benanee; whatever may have been the motive for that transaction, whether it was foolish or wise, whether fairly or unfairly intended, their Lordships think that the evidence wholly fail to connect the widow with it as a fraudulent transaction, or as one in any sense unfair; and their Lordships are of opinion, I repeat, that the evidence does also wholly fail in establishing that as to anything that had gone before. Whatever character, therefore, is given to the instrument of 1832, whoever is believed upon the subject, their Lordships are of opinion that to the case of the widow that is wholly immaterial; her title under the instruments of 1831 is, in either case, not affected by it; and as far as she is concerned, she cannot be prejudiced by treating the case as if that instrument had never existed.

With regard to the judgment of the Supreme Court, it is plain that, considering the parties to the suit in which that judgment was given; it is not evidence in the present case; but it was treated in the Courts in India as their Lordships would be disposed to treat it here, with the greatest deference and respect as a

decision proceeding from such a tribunal. We must recollect, however, not only that that suit had a different object from the present, independently of the mere difference of parties, but that the evidence here is beyond, and is different from that which was before the Supreme Court, upon the occasion of delivering that judgment.

Their Lordships have the high authority of Sir Lawrence Peel, who is present, for saying that, upon the present materials applied to the present issue, he entirely agrees with the conclusion that the title of the principal respondent is not impeachable for fraud. His Lordship entirely concurs with the opinion of the Committee upon this case, and, in the conclusion at which they have arrived, namely, that this has been an unsuccessful attempt, and I fear that it may, without impropriety, be called a litigious attempt, after a very long lapse of years, to impeach the fair title of a person, who, if there was fraud, has upon the evidence, as it strikes their Lordships, been a sufferer from that fraud, and in no sense a participator in it.

Their Lordships are of opinion that the case entirely fails upon the merits, and this relieves them from the necessity of deciding some other points, on which, if it had been necessary to determine the case with reference to them, the appellant might have failed. Upon those points their Lordships give no opinion; but they cannot part with the case without expressing some regret at the inference they are obliged to draw from the materials before them with respect to the character of this litigation. It is impossible for them to believe, upon the present materials, that the true state of the case as between Mr. Cochrane and Mr. Mackenzie, was brought under the notice of the Insolvent Court. Their Lordships are of opinion that, before obtaining leave from the Insolvent Court to prosecute this suit, the true nature of the case should have been explained to it, and the Insolvent Court should have had an opportunity of exercising its controlling judgment upon the propriety of the Official Assignee lending his name for such a purpose, and allowing a gentleman, who was desirous of expending a sum of 400 or 500 rupees for the purpose of buying a right of this description, to use the name of a public officer in the way in which that gentleman's name has been allowed to be used, for this, to every substantial purpose, is the suit of Mr. Mackenzie, from the beginning to the end, and his alone.

Their Lordships, however, do not decide the case upon that point; whether viewed as the suit of Mr. Cochrane or of Mr. Mackenzie, it is one in which their Lordships consider, without the slightest doubt or hesitation, that the appeal ought to be dismissed with costs.

The 20th June 1857.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir J. Patteson.

Executors—Administration accounts—Value of property not forthcoming.

On Appeal from the Supreme Court of Bombay.

Aga Mahomed Rohim Sherazee,

versus

Meerza Ally Mahomed Shoostry and Beebee Mariam Begum.

Without intending to rule that, in all cases where an ordinary administration account has been directed, the value in money of a specific chattel shown to have been possessed by an executor, and not forthcoming, is to be charged against him.—HELD that, notwithstanding the language of the decree, it was, in the un-

doubted circumstances of this case, within the competency of the Master in taking the account, and within the competency of the Court upon the report to charge the executor for the value of certain property, it being impossible to doubt that the original executor had possessed himself of the property, and that the property so possessed was not forthcoming and accounted for.

As to payments stated in the Schedule and in the discharge, as made on account of just demands on the estate, it is competent to the executor to prove them as having been made on other dates than those stated in the Schedule and discharge.

In this case the principal difficulty which their Lordships have felt has been with reference to the sums charged in respect of the two ships, the *Travancore* and the *Harriet*, viz., 98,773 rupees and a fraction in one instance, and 33,387 rupees and a fraction in the other. These two sums stand charged against the executor by the decision under appeal on account of the value of the vessels, or the interest in them of the original testator; and their Lordships are of opinion that, notwithstanding the language of the decree, it was, in the undoubted circumstances of the case, within the competence of the Master in taking the account, and within the competency of the Court upon the report, to charge the executor as for their value in money, it being impossible to doubt that the original executor had possessed himself of the property, and that the property so possessed was not forthcoming and accounted for. Their Lordships do not say that, in all cases where an ordinary administration account has been directed, the value in money of a specific chattel shown to have been possessed by the executor, and not forthcoming, is to be charged against him; they proceed upon the special circumstances of this case, in which the parties on both sides must be taken as acting on the common basis that the executor had possessed the property; that for every practical purpose it had ceased to belong to the estate; and that for every material purpose it was to be considered as represented in money, the question being only one of *quantum*.

Now, in the inventory of the estate filed by the late executor, a certain value had been set on these two portions of the property; that value so set was *prima facie* evidence of the real value—very far from being conclusive—far from being, under ordinary circumstances, satisfactory evidence. But their Lordships have formed the opinion, though after some doubt and hesitation, that the executor of the executor so conducted himself with reference to this matter as to leave the Master no alternative respecting the amount to be charged against him.

The proceedings before the Master appear in his certificate, and especially in so much of it as is set forth in page 111 of the Appendix. It appears thence that the attention of the professional agent of the executor, the appellant, was repeatedly drawn to this particular question; that it was repeatedly suggested to him to consider whether he had evidence to produce, or would produce evidence on this point. Either from inability or from unwillingness to produce that evidence, none such was produced; and their Lordships' conclusion is, that the Master had no choice except between not reporting at all as to this portion of the property, and acting on that test of the value on which he has acted; and their Lordships incline to the opinion that the Master has selected the more correct alternative.

Doubting, therefore, on the subject, but with an inclination of opinion in favor of the Master's conclusion, finding that to be the conclusion of the Court, and the respondents therefore in possession of the decision, their Lordships do not feel themselves warranted in disturbing it, and that part of the appeal must fail.

The next and perhaps the more important question is as to the effect which has been given by the Master, and allowed by the Court, to errors in the dates ascribed to certain payments, or alleged payments. In the "Schedule" to the answer, and in the "discharge," certain payments had been mentioned as made by the executor on account of the estate, at certain dates, for debts due. It appears that those payments were not made at those dates; but the appellant stated his ability to produce, and offered to produce, evidence for the purpose of showing that the payments were in fact made, either as included in greater sums or otherwise, but were

in fact made on the very account charged at different dates. The Master, however, was of opinion that, although these alleged payments were stated in the Schedule and in the discharge, yet it was not competent to the executor to prove them made at other dates than those stated in the Schedule and discharge.

Their Lordships do not arrive at that conclusion, although adopted by the Court upon the exceptions; but on what particular grounds, or for what reasons adopted, they are not informed. Their Lordships are of opinion that, as to payments made on account of just demands on the estate, which were stated in the Schedule and in the discharge, the executor was entitled to prove them if he could, as having been made at different times, it may be widely different from those alleged. How far the inaccuracy of the statement as to dates might affect the costs is a different question; the present question is one of total disallowance. Those who are interested in the estate say that, because a payment was not made at the date assigned to it, therefore it ought to be taken as not made at all. Their Lordships are unable to follow that course of reasoning, and do not consider it warranted by any rule of pleading, of procedure, or of practice, and especially not by the authorities to which reference has been made on the subject.

Their Lordships are of opinion, therefore, that it will be fitting that a declaration should be made as to this part of the case for the guidance of the Court at Bombay. With reference to the exceptions bearing on this matter, it will probably not be necessary either to allow or to even rule them, but the cause certainly must go back to the Master for a review of his report. The effect must be, not merely to vary the order of November 1856, but, as their Lordships at present view the matter, to reverse altogether the three subsequent orders under appeal; they are founded upon the accuracy of those accounts, which at present, in their Lordships' views, have not been proved to be accurate.

On the question whether the payments can by sufficient evidence be established to have been made, as now alleged, their Lordships give no opinion. It is possible that the case may prove a total failure in this respect. Their Lordships proceed on the ground that the person claiming to prove the payments was stopped *in limine* without having been allowed an opportunity of having the weight and value of his evidence tested by the Court before which it was offered and desired to be laid, which Court, in their Lordships' judgment, ought to have taken it into consideration. It follows almost of necessity, from what has been stated, that it must be premature at present to dispose of any questions either of interest or of costs; they must be reserved, notwithstanding the great length of time already consumed in the litigation. Their Lordships, however, distinctly say that it is not their intention, upon the present occasion, to make any order for refunding or bringing into Court any sums which have been paid or obtained under the orders as they exist. It will be for the Court at Bombay to consider how far, when these matters shall be brought before them, either at an earlier or a later stage, it may be required by justice to deal with a demand on the subject, if a demand shall be made. In the course of the argument, particularly that of the Attorney-General, reference was made to the possibility of charging the appellant, the executor, with certain profits. Such a claim would be so far beyond the decree, and the scope of the proceedings hitherto, that their Lordships do not think it right to accede to that, and only now mention it in order that they may not be supposed not to have taken it into consideration.

The Minutes of the order, the heads of which their Lordships have now stated through me, will require very careful attention, and their Lordships, therefore, suggest to the learned Counsel the propriety of preparing Minutes themselves on this foundation, which, if laid before their Lordships in a reasonable time, they will give their best attention to, and they will, if necessary, hear Counsel on the subject. The Lord Justice (Turner) is so good as to remind me of a point I had omitted. I had mentioned costs, but not those of the appeal. Their Lordships are of opinion

that the costs of this appeal should be costs in the cause to be dealt with by the Court at Bombay as that Court shall deem just.

In obedience to the directions of their Lordships, the following Minute was prepared by Counsel, and approved by the Board, on the 27th June :—

“Affirm the order of the 25th November 1846 so far as it overrules the 13th and 14th of the original Exceptions filed by the appellant on the 17th June 1846, and the 4th and 5th of the Exceptions taken by the appellant to the Master’s amended report, filed the 29th October 1846.

“But as to that part of the said order of the 25th November 1846, whereby the 1st, 3rd, and 9th of the said original Exceptions filed by the appellant, and the 1st, 2nd, and 3rd of the said Exceptions to the said amended report are overruled, and whereby it is ordered that the appellant should pay into the hands of the Accountant-General of the said Supreme Court, to the credit of the said causes, the sum of 11,74,459-0 65 rupees, being the balance reported by the Master to be due from the appellant, in the manner and at the periods in the said order mentioned, it is ordered that the same be reversed, and instead thereof it is ordered that the said 1st, 3rd, and 9th of the said original Exceptions, and the said 1st, 2nd, and 3rd of the said Exceptions to the said amended report, be neither allowed nor disallowed. And it is declared that, in taking the account directed by the decree of the 18th November 1834, of the testator’s estate and effects not specifically bequeathed come to the hands of the late defendant, Aga Mahomed Shoostry, deceased, or of any person or persons by his order, or for his use, and of his application thereof, or since the death of the said Aga Mahomed Shoostry, come to the hands of the appellant, or of any person or persons by his order or for his use, and of his application thereof, and, in proceeding on the appellant’s discharge under the same decree, evidence was and is admissible, and ought to have been admitted, of payments stated in the Schedule and discharge hereinafter mentioned to have been made in discharge of debts due from the original testator, or of liabilities affecting his estate, notwithstanding that the dates and amounts of such payments according to the evidence may have varied, or may vary, from the dates or amounts of payment as stated in Schedule (A) to the answer of the late defendant Aga Mahomed Shoostry, or as stated in the appellant’s discharge.

“And it is ordered that it be referred back to the Master to review his report, and to take the accounts directed by the said decree of the 18th November 1834, having regard to the declaration aforesaid.

“Reverse the several orders of the 23rd February 1847, and 19th February 1850, and the decretal order of the 17th September 1847.

“Reserve for the consideration of the Supreme Court the question of interest raised by the 9th of the said original Exceptions, and the 3rd of the said Exceptions to the said amended report, and also the costs of these suits, and the costs, charges, and expenses of the appellant, and of the late defendant Aga Mahomed Shoostry, until after the Master shall have made his report.

“And it is ordered that the costs of the appellant, amounting to the sum of sterling, and likewise the costs of the respondents, amounting to the sum of sterling, in this appeal, be costs in these causes, to be dealt with as the Supreme Court may deem just.

“And it is ordered that the appellant be at liberty to apply to the Supreme Court, as he may be advised, for any order or orders on the respondents directing them to refund, or to pay into Court, any sum or sums of money received by them under or by virtue of the said decretal order of the 17th September 1847, or any part or parts thereof, and the said Court is to be at liberty to deal with any such application as to the said Court shall seem just.

“And it is ordered that the recognizance entered into under the order of Her Majesty in Council, of the 26th December 1851, giving the appellant leave to appeal in the sum of 2,000£, be vacated and discharged.

"And any application which the respondents may be advised to make to the Supreme Court for leave to file a Supplemental Bill is not to be in any manner prejudiced or affected by this order."

And their Lordships agreed humbly to report to Her Majesty accordingly, and to order that their report bear date the 27th June 1857.

The 5th December 1857.

Present :

Lord Wensleydale, T. P. Leigh, Sir E. Ryan, and Sir W. H. Maule.

**Supreme Court of Calcutta (Criminal Jurisdiction of)—9 Geo. IV. c. 74 s. 56
(Construction of)—Criminal offences committed in two places—Limits
of the E. I. Co.'s Charter.**

On Appeal from the Supreme Court at Fort William.

Nga Hoong and others,

versus

The Queen.

Section 56 of the Statute 9 Geo. IV. c. 74 (applying and extending to the British Territories in India the provisions then recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another) applies only to the cases of persons amenable to the Supreme Court at Calcutta beginning to commit offences in one place, which are afterwards completed in another, and not to a case where the persons committing the offence were not amenable to the said Court, and where the whole offence which has been committed was within one jurisdiction.

The term "within the limits of the Charter of the said United Company" construed to mean within the limits of the Trading Charter of the E. I. Co.

THEIR Lordships in this case have had an opportunity of consulting the arguments in the Court of Calcutta; which are ably and perspicuously stated by the Chief Justice and Mr. Justice Buller on one side, and by Mr. Justice Jackson on the other. They have heard as well every argument which could be advanced, either in favor of the conviction, or against it, at the Bar; and, having formed their conclusion, and entertaining no doubt upon the question, they think it would be improper to create any further delay for the purpose of considering this case. They are all quite satisfied that the judgment cannot be supported, and that the conviction was wrong.

The question in this case depends entirely upon the construction of the 9th of George the Fourth, chapter 74, and of the 56th Section of that Act, taken in conjunction with the preamble. Now, there is nothing more clear than that, with respect to the Criminal Law, the construction is always to be strict; and putting a strict construction upon the 56th Section of this Act, we have no doubt that it was not meant to apply to a case of this kind, but that in the first place it extends only to persons who were otherwise amenable to the Criminal jurisdiction of the Court at Calcutta, who are the persons described in the 1st Section; and that, by the language of the Section in question, it applies only to cases in which the felony or crime has been committed, by persons who could commit that crime, partly within the jurisdiction, and partly without.

The object of the Statute, as appears by the recital, was for the purpose of applying and extending to the British territories in India the same provisions as had been recently made for England with respect to offences committed in two different places, or partially committed in one place, and accomplished in another, which provisions had been the subject of a recent enactment in the 9th of George the Fourth, chapter 31. The preamble describes that to have been the object of the Statute; and there can be no doubt that we must consider the preamble as a key to the construction of the Statute, though it would not, of course, control every provision: for we very often find that the subsequent provisions of a Statute extend beyond the limits of the preamble.

The Statute goes on to say that the object being that the "alterations should be extended to the British territories under the Government of the United Company of Merchants of England trading to the East Indies," it is, therefore, enacted that the Act "shall extend to all persons and all places, as well on land as on the high seas, over whom, or which, the Criminal jurisdiction, of any of His Majesty's Courts of Justice, erected or to be erected within the British territories under the Government of the United Company, does, or shall hereafter, extend." Now, that Clause clearly shows that the object of the Statute was that it should apply to such persons. The Solicitor-General says that the word "extend" is not to be construed to confine it to such persons, and that it is not to limit the jurisdiction. But the word "extend" is to be explained by the preamble, which states the object of the Statute to be to extend the recent enactments of the Act which is in force to the East Indies, and the word "extend" is to be read the same as if it were "apply."

Then we must consider whether the 56th Section applies merely to those persons, or whether, as the Chief Justice and Mr. Justice Buller have stated, it extends beyond the preamble, and applies to an offence completely committed within the limits of the Company's Trading Charter, but not within the limits of Calcutta. Now, reading that Clause, we think that there is really no difficulty in saying that the sole object of it was that it should apply to offences partially committed in one district and completed in another. The words of the Clause are: "That were any person being feloniously stricken, poisoned, or otherwise hurt,"—the word "feloniously" seems to show that it was meant that at the time when the person gave the original stroke, he was a person capable of committing felony—"at any place whatsoever, either upon the land or at sea within the limits of the Charter of the said United Company, shall die of such stroke, poisoning, or hurt at any place without those limits; or being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon land or at sea, shall die of such stroke, poisoning, or hurt, at any place within the limits aforesaid, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, enquired of, tried, determined, and punished by any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, in the same manner in all respects as if such offences had been wholly committed within the jurisdiction of the Court, within the jurisdiction of which such offender shall be apprehended or be in custody."

One question raised before us by the learned Counsel for the appellants, is as to the meaning of the term "within the limits of the Charter of the said United Company." On that point I believe, their Lordships have not the slightest difficulty. Those words are to be construed in the same way as they are used in the Statute of the 26th of George the Third, to which this Statute forms an addition. They are to be construed to mean within the limits of the Trading Charter of the Company. So far, therefore, as regards the place of committing the offence, this was an offence committed within those limits, and the Court had in that respect jurisdiction. But the words of the Section do not apply to entire offences begun and completed within the jurisdiction, but to those partly committed within, and partly without, which are put on the same footing as if they had been "wholly committed within the jurisdiction." It is perfectly clear that the term "wholly" shows the intention of the Legislature to be, that the Section shall apply only to that description of case; and it cannot have the sense of "actually committed" put upon it, as is contended on the part of the Crown, without doing violence to the words. Therefore, it appears to us, proceeding upon the ordinary rules of the construction of penal enactments, that the object of this Section was merely to apply the improvement of law, which had lately taken place in England, to the case of persons amenable to the Court of Justice at Calcutta, beginning to commit offences in one place, which were afterwards completed in another: that it does

not apply at all to a case of this kind, were the persons committing the offence were not amenable to the Court of Calcutta, and where the whole offence which has been committed was within one jurisdiction.

The Court are confirmed in their opinion as to the meaning of the Statute, with respect to the persons to whom it is applicable, by the last Clause, the 127th Section. It is introduced at the end of this Statute obviously with the purpose of showing what class of persons were liable to the provisions of the Statute, and it extends the liability of persons to the jurisdiction of the Courts beyond what it had been before. That Section enacts: "That all persons, whether British subjects or others, employed by or in the service of His Majesty shall be held subject and amenable to the Criminal jurisdiction of his Majesty's Courts of Justice, erected or to be erected within the British territories under the Government of the said East India Company, in the same manner as persons employed by or in the service of the said United Company are now by law subject and amenable to the said jurisdiction." Before that Statute, British subjects properly designated as British subjects that is, British-born subjects, and persons in the service of the East India Company, were liable to the jurisdiction of the Court of Calcutta: persons not in the employment of the East India Company, but in the employment of His Majesty, were not so liable. This Statute extends the liability to those who are servants of the Crown; and that provision, finding its place in this Act of Parliament, raises, in their Lordships' opinion, a strong inference that the Statute was meant to apply to no other persons than those who were liable to the jurisdiction of the Court of Calcutta, to which the last Clause makes a considerable addition.

Therefore, looking at this Act of Parliament altogether, their Lordships have not any doubt what the object of that Statute was: it was only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and completed in another, to the East Indies, and not to make a new enactment rendering persons liable to punishment for a complete offence, who would not have been liable before. If the result of our decision should be, that these appellants are to escape from justice, we shall regret it; but that is a matter which cannot influence our judgment. If the Mofussil Court has no jurisdiction now, by virtue of the East India Company's Regulations, to dispose of this case, they must escape justice; but we are not, in any way, to alter or construe differently the rules of the Criminal Law in consequence of the supposed justice of a particular case. The rule is, that that law is to be strictly construed; and so construing it, or even without that strictness, the construction of this 56th Section appears to us to require us to pronounce in favor of the appellants.

The 2nd February 1853.

Present:

The Judge of the High Court of Admiralty, Lord Justice Knight Bruce, the Chancellor of the Duchy of Cornwall, and Sir E. Ryan.

Limitation (Regulation II. 1803 Section 18 Clause 3)—Construction of—Insanity.

On Appeal from the Sudder Dewanny Adawlut of Agra.

Troup and Solaroli,

versus

The E. I. Company.

The Hon'ble Mrs. Dyce Sombre,

versus

The E. I. Company.

The words "other good and sufficient cause," in Clause 3 Section 18 Regulation II. 1803 of the Bengal Code, include Insanity, whether there has been or is a Commission of Lunacy or the like, or not;

and the word "precluded" in the same Clause does not mean precluded during the whole term of 12 years or merely at its commencement, but means in effect precluded during any part of it.

In computing the 12 years period of limitation, there should not be reckoned any time elapsing while the person for the time being entitled to seek redress was not free from disability.

THE question, or the main question, raised by these appeals is of the true construction of a passage contained in the 3rd Clause of the 18th Section of the Bengal Regulation, No. II of 1803, as, with reference to the undisputed facts, affecting or not affecting the suits brought by the appeals before us. I say the "undisputed facts," for the facts disputed are, in the view taken by their Lordships, not, for any present purpose, material.

The Clause is thus worded :—

"That, after the period of twelve years shall have elapsed from the date of the cession of the Provinces, ceded by the Nawab Vizier to the Honorable the English East India Company, the Courts of Adawlut are prohibited from hearing, trying, or determining the merits of any Civil suit whatever, if the cause of action shall have arisen at a period being twelve years antecedent to the date on which the petition for the institution of such suit shall be presented to the Court ; unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly referred his claim, within that period to the matter in dispute, to a Court of competent jurisdiction, or person having authority, whether local or otherwise, for the time being, to hear such complaint and to try the demand ; and shall assign satisfactory reasons to the Court why he did not proceed in the suit ; or shall prove that either from minority or other good and sufficient cause, he was precluded from obtaining redress : Provided, however, that it shall not be competent to the Zillah Courts, under the powers vested in them by this Clause, to hear, try, or determine, the merits of any Civil suit whatever, if the cause of action shall have arisen previous to the 10th day of November 1801, the date of the cession of the Provinces ceded by the Nawab Vizier to the Honorable the English East India Company."

The appeals are against judgments of the Sudder Dewanny Adawlut Court of Agra, affirming judgments of the Zillah Court of Delhi, which, in two Civil suits instituted against the respondents by plaint in the Civil Court of the Principal Sudder Ameen at Delhi, and transferred thence to the Zillah Court of Delhi, gave effect to so much of their defence in each case as, founded on the Clause that I have read of the Regulation, was analogous to what in England is called a plea of the Statute of Limitations. The residue of their defence, therefore, did not—the "merits" did not—in either Court receive any determination.

The suits were instituted in the year 1848 ; the original plaintiff having been David Ochterlony Dyce Sombre, a person of mixed European and Asiatic descent, who had become insane some years before, and the Committee of his Estate under a Commission of Lunacy, issued against him in England, where D. O. Dyce Sombre passed some portion of his life after the year 1836, the year in which the alleged causes of action in suits took place. He was living when each of the judgments was pronounced, but died in the year 1851 ; and some time after that event, the suits having been commenced in respect of property, moveable and immoveable, in the North-Western Provinces of India, which he, before his lunacy, and the Committee for him after the Commission, claimed against the respondents. The proceedings were revived by the present appellants, the representatives respectively of the lunatic after his death, as to the lands and goods in litigation—an amount of property, together, of considerable extent and value ; all which had been in the possession of a wealthy Begum called Sumroo, who resided, and was, nominally at least, a kind of small Sovereign, at Sirdhana in those Provinces, and died there at an advanced age in the year 1836.

D. O. Dyce Sombre seems to have stood towards her in the relation of an adopted son, or in an analogous position, and succeeded to the bulk, at least, of her riches. That bulk included, as he said and insisted, the lands and moveables in dispute, of which, indeed, or some at least of which, she appears to have made, or, so far as within her power, made to him a donation, or donations, in her life-time ; and he seems to have had them, or some part of them at least, in his possession,

accordingly, before and at the time of her decease. Soon after that event, and in the same year, 1836, the respondents claiming the property in controversy, of both kinds (the moveables at least, or some of them, having been in her own possession when she died), seized it; we do not say with violence, but seized it: asserting and acting upon their alleged right in the most practical manner. They have never relinquished the property thus rightfully resumed (as the respondents say), or, as the appellants say, wrongfully taken.

D. O. Dyce Sombre never submitted to this, except that he instituted no suit. He objected, remonstrated, memorialized, represented himself as unjustly treated; but whether wisely or otherwise, did not resort to a Court of Justice. It was the Committee of his Estate, I repeat, that, in the year 1848, did so, using both their names.

D. O. Dyce Sombre was at Sirdhana, we believe, when the Begum died; was then, we also believe, upwards of 21 years of age; and (as for every present purpose it must be taken) was, at that time, neither insane nor under any other disability, a state of things which must be deemed to have continued uninterruptedly for several years next after her death, except as to his residence. He probably remained at Sirdhana for some weeks at least next following her decease, and in Asia during the whole of the year 1836, and part, at least, of the year 1837. He came to Europe between the end of the year 1836 and the end of the year 1841; and probably never was again in the East Indies. The Commission of Lunacy issued in the year 1843. He was found under it to have been a lunatic from some time in the year 1842. The Commission of Lunacy was never superseded, and we must, for the purpose of the appeals, consider it as clear and admitted that, from a time previous to the end of the year 1842, and thenceforth continually to his death, he was an insane person. The acts of which the plaintiffs, the suits complained, were done in the year 1836. It was in that year that the respondents took that possession of the disputed property of each kind, which, alleged by those proceedings to be wrongful, was the ground-work of the suits.

And we assume that possession to have been taken, and those acts to have been done before August 1836, while it was in August 1848, and not before, that the plaintiffs were filed. The respondents, on this ground, by their answers to the plaintiffs, set up the 3rd Clause of the 18th Section of the Bengal Regulation No. II of 1803 (already mentioned), as barring the suits. They set up also other defences, valid or invalid, just or unjust, with which we are not at present concerned. The Zillah Judge, considering the limiting Regulation to apply to the cases, dismissed the plaintiffs for that reason in the year 1849, and his opinion was affirmed on appeal in the year 1850, by the Sudder Dewanny Adawlut Court at Agra; from which judgment, in each instance, the appeals now before us have been brought.

The representatives of D. O. Dyce Sombre, being by revivor, as I have said, the appellants, allege with truth that the acts of which the plaintiffs complained, and for which they sought redress, having been done in the year 1836, were, therefore, done less than eight years before the time of issuing the Commission of Lunacy, and less than seven years before the commencement of that state of insanity in which D. O. Dyce Sombre, as I have also said, was continually from some time in the year 1842 until his death. And the only question that we can, or at least need, now decide is, whether, in that condition of circumstances, the alleged bar is effectual—whether such a bar has taken place. Their Lordships think not.

Those words of the Clause of the Regulation upon which the controversy mainly or altogether turns, are, “shall prove that, either from minority or other good and sufficient cause, he was precluded from obtaining redress;” words the last four of which are especially remarkable, and which, of course to be construed not without reference to the context, seem to their Lordships of difficult interpretation, nor are they surprised that the meaning should have been viewed differently by different minds.

But we conceive that "other good and sufficient cause" must include insanity (whether there have been or be a Commission or Committee, or any analogous measure, or not); and that the word "precluded," which must necessarily be understood as referring to some time or period, does not mean "precluded" during the whole of the term of twelve years, or merely at its commencement, but means, in effect, "precluded" during any part of it. The conclusion at which we have arrived on the subject, is rather, therefore, that reached by the Sudder Courts of Bengal in analogous cases, than that of the Zillah Court of Delhi and the Sudder Court of Agra, in the present. Those two Courts, it is right to add, having acted, or intended to act, conformably to the spirit of former decisions of Courts within the North-Western Provinces, in holding, as they did, on the hypothesis of twelve years and more, from the time of the accruing of the cause of action, in each case, having elapsed before either plaint was filed, and D. O. Dyce Sombre having been in the North-Western Provinces, and under no disability when each cause of action accrued, and for a considerable period afterwards, and having been a free man, of sound mind, until some time in the year 1842, and the Committee of his Estate in the Lunacy having been appointed to that office in the year 1844, that the question under the Regulation was substantially whether the lunatic and his Estate (so to speak) had been guilty of negligence, had not exhibited reasonable and due diligence in prosecuting the claims; and the Delhi and Agra Judges, being of opinion that that question ought to be answered against D. O. Dyce Sombre and his Committee, decided accordingly. Their Lordships are of opinion, with the Bengal Sudder Courts, that the meaning and intention of the framers of the Regulation are shown by it to have been that, in computing the twelve years mentioned in it, there should not be reckoned any time elapsing while the person, for the time being entitled to seek redress, was not free from disability. Here, if we are right, the appellants are certainly clear of the Regulation, and the time between the commencement of D. O. Dyce Sombre's lunacy, in the year 1842, and his death, cannot count against him or the appellants. The suits having been instituted in the year 1848, were, therefore, in their Lordships' judgment, as effectually instituted as if they had been so in the year 1844; their Lordships considering themselves bound to give effect to the language of the Regulations as they interpret it,—language very different from that of the English Statute Law on such subjects. They deem it right to say, in addition, that had they, with the Courts at Delhi and Agra, considered it to be properly under the Regulation, a question of judicial discretion whether in the circumstances of the particular cases, or either of them, to hold the plaints or actions, or either of them, barred, their Lordships would have been disposed to think the respondents wrong on that point also.

Their Lordships do not consider it necessary to intimate an opinion as to any other point raised in the argument of either appeal, nor do they wish to be understood as suggesting that, if D. O. Dyce Sombre had in the year 1844 recovered from his insanity, had without any re-lapse or interruption continued a sane man from that time until his death, and lived, in fact, until some time in the year 1852, and had in that year instituted against the respondents suits such as those instituted in 1848, *mutatis mutandis*, and the suits of 1848 had not existed, the suits of 1852 would not have been effectually barred by the Regulation. As matters, however, are, their Lordships, on the grounds that have been stated, hold that the judgments under appeal should be reversed, and, with that reversal, the whole matter remitted; the respondents paying the Indian costs so far as occasioned by the defence on the ground of lapse of time founded on the Regulation, and the cost of the appeals to Her Majesty, to whom the Committee will report accordingly.

The 5th February 1858.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir W. H. Maule.

Wills (of Hindoos)—Construction of.

On Appeal from the Supreme Court of Calcutta.

Soorjeemoney Dossee,

versus

Denobundoo Mullick.

Principles laid down for construing the Will of a Hindoo.

Where the father of a joint Hindoo family by Will left his property to five sons in equal shares, with a proviso that, in the event of any of the sons dying without a son or a son's son, the share of the deceased co-sharer should go over to the survivors.—HELD that in the absence of express declaration or necessary inference by the testator that the sons should continue a joint family, and that the share of the income of a deceased co-sharer should go over with the principal to the survivors, such an intention could not be imported into the Will, but that the widow of the deceased co-sharer was entitled to her husband's share of the income which accrued during his life-time.

SREEMUTTY SOORJEMONEY DOSSEE, the appellant in this case, is the widow and personal representative of Surroopchunder Mullick, who was one of the five sons of Bustomdoss Mullick, the testator in the cause out of which the appeal arises. Bustomdoss Mullick by his Will, dated the 8th March 1841, made the dispositions contained in that instrument. He died on the 10th March 1841. Surroopchunder Mullick survived him ; but afterwards died on the 25th November 1847. On the 20th August 1855, the appellant filed her bill in the Supreme Court of Judicature at Fort William in Bengal against the respondents, who are, or represent, the four other sons of Bustomdoss Mullick, claiming to be entitled to one-fifth of the income which arose from his estate in the interval between his death and the death of Surroopchunder Mullick, and to one-fifth of the accumulations made from that income. This bill was met by demurrers for want of equity, and as to some of the parties upon other grounds also ; which, however, were not insisted upon in the argument before us. Upon the argument of these demurrers they were allowed by the Supreme Court, and the appeal before us is from the orders by which they were allowed. The decision having been made upon demurrer, it must, of course, depend upon the allegations of the bill, whether it ought to be upheld or not.

[The Bill was here stated.]

The case, therefore, which is made by this bill is that the income of the estate of Bustomdoss Mullick, which accrued between the time of his death and the death of Surroopchunder Mullick, was joint estate of the five brothers, and that the appellant, upon the death of Surroopchunder Mullick, became entitled to her share of that income. That the appellant, or the appellant and her daughters, would be so entitled if the income in question is not affected by the gift over, contained in the eleventh item of the Will, is not attempted to be denied ; but it is insisted on the part of the respondents that, by virtue of the gift over, the income passed with the principal to the four surviving brothers.

This, therefore, is the question which we are called upon to decide. It is a question between the estate of Surroopchunder and the parties claiming under the gift over ; and, as it seems to us, it must depend wholly on the construction of the Will. In determining that construction, what we must look to is the intention of the testator. The Hindoo Law, no less than the English Law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition ; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the Will are to be considered. They convey the expression of the testator's wishes ; but the meaning to

be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the Will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language the Will or the surrounding circumstances displace that assumption.

These are, as we think, the principles by which we ought to be guided in determining the case before us ; and we must first, therefore, consider what was the intention of this testator to be collected from the words of his Will. Now, there is here, in the first item of the Will, an absolute gift of one-fifth of all the testator's property to each of his five sons ; but in the 11th item of the Will, in the event of any of the five sons dying without a son or a son's son, there is a gift over to such of the other sons or son's sons as may then be alive. Upon the literal construction of these dispositions what is given by the 1st item is, in effect, taken away by the 11th ; for, if full effect be given to the 11th item, it would vest in contingency during the life of each son, whether his share would belong to him or to his brothers or nephews, depending upon whether he should die leaving a son or a son's son ; but this construction cannot, of course, be admitted. To adopt it, would be to impute to the testator this inconsistency, that he intended at the same time to give absolutely and contingently. This cannot have been his meaning. He must have intended that those to whom he gave absolutely should have some enjoyment of that which he gave to them. That enjoyment could not be less than the enjoyment of the income of their shares. It was suggested, indeed, in the argument before us, that the words "the share that he has obtained of the immoveables and moveables of my estate," would reach the income no less than the capital. But, independently of what has been already said, this suggestion cannot, as we think, be maintained. The Will of a testator must *primâ facie* at least be taken to refer to that which is the subject of his disposition—the property which he has himself to give ; and if he has evinced his intention to give that property, very strong and clear language must be required to countervail that intention, and subject the property which he has once given to this further disposition. No such intention can, as it appears to us, be collected from this Will ; and so far, therefore, as the intention of this testator is to be gathered from the words which he has used, we think that we are safe in concluding that his intention was, that his sons should, in any event, enjoy, during their lives, the income of their shares of his property. It is satisfactory to find that, in this respect, we agree in opinion with the Court whose judgment we are called upon to review.

Such, then, being the intention of the testator to be collected from the 1st and 11th items of the Will, it is next to be considered whether the other dispositions of the Will evince any different intention, and it does not appear to us that they do. They seem to relate only to the mode in which the estate is to be administered, and to the burthens to which it is to be subjected.

If, therefore, we are to impute to this testator any intention different from that which is to be collected from the words of his Will, it must be upon the ground that there are extrinsic circumstances which disprove the expressed intention, and prove the different intention. The expressed intention ought, as we conceive, to prevail, unless the different intention be clearly demonstrated. We may doubt whether the testator really intended what his words import, but a Court of construction must found its conclusions upon just reasoning, and not upon mere speculative doubts. What, then, are the extrinsic circumstances upon the faith of which we are called upon to conclude that it was the intention of this testator that the income of his sons' shares of his property should not form part of their estates, but should go over with the principal of their shares. They are two : *first*, that this was a

joint family, and that the sons were joint in estate; and *secondly*, that by the Hindoo Law, where parties are joint in estate, the increment follows the principal. As to the first of these grounds, it does not seem to us at all to affect the question we are called upon to decide; for, admitting the family to have been joint, and the sons joint in estate, the right of any one of the co-sharers would not, under the Hindoo Law, pass over, upon his death, to the other co-sharers; it would be part of the estate of the deceased co-sharer, and would devolve upon his legatees, or his natural heirs. It does not, therefore, seem to us that it would follow from the sons having been joint in estate, that what was given to one was meant upon his death to go over to the others, even if the joint estate had been constituted by the Will; much less so if, as the Court in India has thought, and as we think, the testator has not by his Will imposed upon his sons the obligation of continuing joint in estate. Then as to the rule of the Hindoo Law, that the increment follows the principal where the parties are joint in estate. It is not necessary for us to give any opinion upon the extent and limits of this rule, and we desire not to be understood as intimating any opinion upon those points. The question in this case, as we view it, is, whether the rule is properly applicable to the case before us; and we are of opinion that it is not; assuming that the testator could, if he had thought fit, have imposed upon his sons the obligation to continue joint in estate; appoint on which also we give no opinion. He has not, as we think, imposed that obligation, and we do not think that a rule which might well have been applicable had the obligation been validly imposed, can properly be applied in a case where the obligation has not been imposed. It was argued, indeed, at the bar, that the testator contemplated that his sons would continue joint in estate, and the learned Judges of the Supreme Court seem to have so considered, and thence to have deduced the inference that he meant the income of each son's share to go over with the principal. We think, however, that the learned Judges were not justified in applying this assumption to the construction of the Will. The testator must, of course, have known that his sons were joint in estate, and he has not attempted to interfere with their election whether they would continue so or not. If they had severed in estate, there can be no doubt that the income of each share would have belonged to the owner of that share. Can we say that the testator did not contemplate that there might be such a severance; and if not, on what ground are we to rest the inference which the Court has deduced? Can we say that the testator intended that if his sons continued joint in estate, the income of their shares should go over with the principal; but that if they severed in estate, each should take his share of the income? We think not. Such an intention might have been expressed, but the testator has not expressed it, nor, so far as we can see, does his Will furnish any sufficient ground for presuming that he so intended. In the absence of express declaration, or of what may be called necessary inference, we are of opinion that such an intention cannot be imported into the Will. The effect of it would be to render the disposition of the property dependent, not upon the Will of the testator, but upon the subsequent acts of his legatees. The character and position of a legatee may well form the inducement to the gift in his favor, but we think it is going too far to say that, in the absence of express declaration or necessary inference, the extent of the gift can be measured by the legatee's continuing or not continuing to hold that character and position. Such considerations do not, we conceive, form legitimate elements in the construction of the Will. We collect from the judgment, that the learned Judges considered that it was more consonant to the principles of the Hindoo Law to hold that the increment should go over with the principal than that it should pass to the natural heirs; but the construction which the learned Judges have put upon the Will by enlargement of its terms, seems to us to be at variance, rather than in consonance, with the spirit of the Hindoo Law. Equality among the heirs is, as we understand, the spirit of the law. The law does not treat the principal and the increment as undistinguishable in their nature, for there is no doubt they may

be severed ; but it treats them as united for the purpose of dividing them equally amongst all the united family, that is, all the heirs ; and if that entire equality cannot, as in the present case in consequence of the dispositions of the Will it cannot, be attained, the partial attainment of it seems to us to be more in the spirit of the Hindoo Law, than its total rejection. Upon these grounds, we find ourselves unable to agree in the opinion of the Supreme Court, and are of opinion that these demurrers ought to have been overruled ; we shall, therefore, humbly recommend to Her Majesty that these orders be reversed, and the demurrers overruled. The Supreme Court has thought that the costs of the demurrers in that Court ought to be paid out of the state, and we think that the costs of the appeal ought to be so paid also, and we shall accordingly add this provision to our recommendation.

The 15th February 1858.

Present :

Lord Justice Knight Bruce, the Chancellor of the Duchy of Cornwall, Sir E. Ryan, and Lord Justice Turner.

Hindoo Law—Adoption—Widow (of Member of divided Hindoo family)—Rights of.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Soondur Koomaree Debea,

versus

Gudadhur Pershad Tewaree.

Gudadhur Pershad Tewaree,

versus

Soondur Koomaree Debea.

According to the Hindoo Law a power to adopt may be given verbally.

The widow of a childless member of a divided Hindoo family is entitled to a life interest in her husband's estate after the death of an adopted son before attaining majority.

THESE cases came before us upon two appeals, in the nature of appeal and cross-appeal. The appeals arise out of two suits in the Zillah Court of Burdwan, in the nature also of suit and cross-suit. The first of these suits was instituted on the 9th of May 1834, by Soondur Koomaree *versus* Gudadhur Pershad, for the purpose of recovering from him some property of Hurree Pershad Tewaree, the late husband of Soondur Koomaree.

In this suit Soondur Koomaree Debea claimed as the widow of Hurree Pershad and as the mother of Rada Pershad, a minor whom she had adopted, as she alleged, by the permission of her late husband.

It appears that she was non-suited by the Sudder Ameen, in the first instance, on the ground that Rada Pershad, the adopted son, had died, and that a second adoption which she had made was not valid ; but that, on appeal, the Sudder Court set aside the non-suit, and directed that, on her proving her title as heir of Rada Pershad, the first adopted son, the case should proceed. It further appears that Soondur Koomaree accordingly proved her heirship ; and that she then also put in a claim to be entitled in her own right, under a deed of Unomuttee Pottro, alleged to have been executed by Hurree Pershad, and which had been produced on the first hearing before the Sudder Ameen, in support of the authority to adopt, and the case was then again heard before the Sudder Ameen, and she was again non-suited upon the ground that the Unomuttee Pottro was invalid, and that her suit having been instituted on behalf of Rada Pershad, as heir, she was not entitled to recover in her

own right as widow and heir, but that she again appealed to the Sudder Court, and that that Court then pronounced the following decision :—

“As the appellant sued in the first instance as widow of Hurree Pershad, and as mother of her adopted son, a minor, and when she appealed from the non-suit, claimed to be heard as widow according to the Shasters, as devisee under the two-fold deed called Unomuttee Pottro, and as heir of her adopted son, it is clear she never gave up her claim as widow, though she was preferring a claim to be heard as mother also of Rada Pershad. Her right as widow has been decided by the Principal Sudder Ameen himself in his decision, confirmed in appeal by the Sudder Court, therefore it is indisputable. As she never gave up this right, though she brought more prominently forward the rights by adoption, equity requires that she should be allowed to prosecute her claim on the former, notwithstanding the latter had been adjudged invalid.

“Ordered,—That the case be returned to the Zillah, to be restored to the file, and re-tried on its merits. Let the whole value of the stamp paper of the petition of appeal be returned to the appellant ; and since the remuneration of pleader's fees has been arranged under the provisions of Regulation XII of 1833, therefore no orders are necessary upon this point.”

It also appears that the case was accordingly re-tried upon its merits, and the following decree pronounced by the Sudder Ameen, and subsequently, upon appeal, affirmed by the Sudder Court :—

“On a consideration of the foregoing circumstances, ordered that this case be decreed. The plaintiff is to get from the defendant the sum of 54,914, rupees 12 annas 7 gundas 2 cowrees 2 kranteh, being a moiety of the ready cash in the malkhanah and profits of the zemindaree, &c., and the amount of fine remitted, and 3,660 rupees 15 annas 15 gundas 2 kranteh, the amount of exchange for Sicca rupees into that of the Company's, making a total of 58,575 Company's rupees 12 annas 2 gundas 3 cowrees, and interest thereon from date of suit to this day ; and the plaintiff to get possession by demarcation and partition, a moiety of the remaining lands, tanks, and gardens, with trees and places as specified in the plaint, the partition to be made by deputation of an Ameen, save and except the lands, tanks, gardens, and places, &c., and the house, of Shoodhakrishn Ghose and the Asareeah mangoe trees specified in the first paragraph, and denied by the pleader of the defendant. Let the worship of the idol, with Lot Raylah appertaining thereto, the Asareeah mangoe trees and other goods of the Debshowah, be performed and continued in the custody of both the parties. The plaintiff is to get a moiety of the rent of the house of Shoodhakrishn. The costs of Court proportionate to the claim established is to be borne by the defendant, and the plaintiff is to get interest on the amount decreed from to-morrow's date.”

The second of the appeals before us, that of Gudadhur Pershad, is from these decrees of the Sudder Ameen and of the Sudder Court.

It may be as well, at this point of the case, to state that there is no appeal before us from the order of the Sudder Court of the 29th July 1845 ; and that we feel bound, therefore, to regard Soondur Koomaree as suing, and, of course, as defending, also, in all the characters referred to by that order. We agree with the Sudder Court that he ought to be so regarded.

The other suit in the Zillah Court of Burdwan, to which we have referred, was instituted by Gudadhur Pershad against Soondur Koomaree on the 9th of August 1834, for the purpose of recovering the whole estate of Hurree Pershad, upon the ground that Soondur Koomaree had forfeited her rights as widow and heir by unchaste and un-widowlike conduct, and that the Unomuttee Pottro was fabricated, and the adoption under it invalid.

In this suit Gudadhur Pershad was nonsuited by the Sudder Ameen, upon the ground that Soondur Koomaree had not forfeited her rights as widow and heir ; but the Sudder Ameen, in the judgment pronounced by him, declared his opinion that the Unomuttee Pottro was a fabricated instrument, and that Soondur Koomaree was only entitled to Hurree Pershad's property for her life, and that upon her death Gudadhur Pershad would be entitled to it.

From this decree of the Sudder Ameen, Soondur Koomaree appealed to the Sudder Court, but the Sudder Court was also of opinion that the Unomuttee Pottro was fabricated, and dismissed the appeal.

The first of the appeals before us, that of Soondur Koomaree, is from these two latter decrees.

It was objected to this first appeal, that it is merely an appeal from reasons on which the decree is founded, and is therefore incompetent; but their Lordships are of opinion that the decree cannot be regarded otherwise than as establishing the invalidity of the Unomuttee Pottro as between Soondur Koomaree and Gudadhur Pershad, and all parties claiming under them, and they are of opinion, therefore, that this objection cannot be maintained.

They have felt it their duty, therefore, to examine these cases upon their merits. Upon proceeding to examine them, the first question plainly is, the validity of the instruments on which the right to adopt is claimed, and more especially of the Unomuttee Pottro, on which the claim to the property is founded, failing the adoption.

In examining this question, the facts of the case require particular attention. Some of them are common to both parties. Byjnath Tewaree died, leaving two sons, Ram Pershad, and Gudadhur Pershad, the party to these proceedings. Ram Pershad afterwards died, leaving one son, Hurree Pershad. Hurree Pershad married Soondur Koomaree, the other party to these proceedings. Hurree Pershad was a minor at the time of the death of Ram Pershad, his father, and Gudadhur Pershad was appointed to be his guardian. After Hurree Pershad had obtained majority, and in the year 1842, a separation took place between him and his uncle, Gudadhur Pershad, and the joint property was divided between them. Thus far both parties are agreed. The question we are now considering depends upon what took place after this partition. It is alleged by Soondur Koomaree, that in the month of August 1831, Hurree Pershad, being in a state of approaching dissolution determined to empower her to adopt a son, and to constitute her sole heiress, and proprietor and owner of his property; and that he accordingly, on the 15th of August 1831, lodged with the Judge and the Collector two petitions, each of which was in these terms (p. 79); and that he also, on the same 15th of August 1831, executed an Unomuttee Pottro, in these terms (p. 79); and that under the authority given to her by these instruments, she, on the 15th of January 1832, adopted Rada Pershad, the son of her sister. On the other hand, Gudadhur Pershad wholly denies the validity of these instruments, and alleges that they were fabricated; that Hurree Pershad's signature to them was forged and his seal affixed to them at a time when he was wholly insensible; and he relies upon the contents of the instruments, and upon some erasures which appear upon the Unomuttee Pottro, as conclusive in his favor upon the question.

It was much pressed upon us in the argument on his part, that the Judge of the Zillah Court, by whom these questions were first decided, had the opportunity of seeing the original Unomuttee Pottro and petitions, and the witnesses on whose testimony the case was said to depend; and that both the Courts in India had better means than we have of knowing the customs and habits of the people, and of judging whether such instruments as those which are in question were likely to have had existence. Their Lordships are fully sensible of the weight which is due to these considerations, and they would not lightly differ from the Courts in India upon questions of evidence or of custom; but it is their duty carefully to examine the cases which are brought before them, giving, of course, full weight to the decisions which have been pronounced upon them; and if upon the result of that examination they are satisfied that those decisions are not well-founded, it is not less their duty to declare that opinion.

In this case their Lordships have the misfortune to differ from the Courts in India, and they have less difficulty in doing so, as the question to be decided depends much more upon the documentary than upon the parol evidence. Both, however, must, of course, be regarded; and it is scarcely necessary to say that, from the very nature and constitution of these suits, the evidence taken in each of them must be looked at in determining the other.

In considering the validity of instruments of this description, it is of great importance, in the first place, to ascertain the position of the parties at the time

when the instruments are alleged to have come into existence, and the motives which may have led to the execution of them. This case presents no difficulty in that point of view ; for the evidence on the part of Gudadhur Pershad abundantly proves that, at the time when these documents are alleged to have come into existence, there could be no other state of feeling between Hurree Pershad and Gudadhur Pershad, than the most determined enmity. Nearly every witness examined on the part of Gudadhur Pershad, proves that they were continually quarreling. Neither can any one doubt the great importance attached by the Hindoos to the existence of a son—their salvation depending upon it. We start, therefore, with every probability in favor of these documents.

It is not, however, upon probabilities that this case can be decided. We must look to the facts. The first and most important fact to be attended to is that of the petitions to which we have referred, having been lodged in Court, and before the Collector, on the 15th of August 1831. Nothing can be more strong than the language of these petitions, if they are authentic. They purport not merely that there was to be power to adopt, but that the property was to be the wife's. A power to adopt may, as we understand the Hindoo Law, be given even verbally. Surely, then, these documents, if authentic, must be taken to have given it, or, at all events, to prove that it had been given. Is there, then, any sufficient reason to doubt their authenticity ? They bear not merely the seal, but the signature, of Hurree Pershad. Respondent has given no proof that the signature is not genuine. His witnesses are silent upon the subject. He has not even attempted to prove the forgery he alleges. The absence of any such evidence, under such circumstances, furnishes, as their Lordships think, strong ground for assuming the authenticity of these petitions ; and if authentic, they would alone, as it appears to their Lordships, be sufficient to dispose of Gudadhur Pershad's case ; for it has not been disputed at the Bar, though it was disputed in the pleadings, that if there was power to adopt, there was a valid adoption of Rada Pershad, and Soondur Koomaree is the heir of Rada Pershad. It was said, however, that the Unomuttee Pottro was, at all events, fraudulent, and it was sought to affect the authority of these petitions by the fraud in fabricating the Pottro. The case was presented to us, in this respect, as if the petitions and the Unomuttee Pottro depended wholly upon the same evidence ; but this is not so. The petitions having been lodged in Court, have the stamp of authority, which is wanting in the case of the Unomuttee Pottro. As to the Unomuttee Pottro itself, however, how does the case stand ? This instrument purports also to be signed and sealed by Hurree Pershad ; and there is the same absence of evidence to prove that the signature to it was forged, as there is with respect to the signature of the petitions.

The Sudder Ameen, in his judgment, places reliance upon the date of the instrument having been erased, and some other date having been substituted ; but whatever alteration may have been made in the date, it is plain that the deed was executed in the life-time of Hurree Pershad. Not only does this appear by the answer of Gudadhur Pershad, but the very date of the alleged fabrication of the deed is mentioned in the petition presented by him on the 9th August 1838, and is fixed as being the day before the death of Hurree Pershad ; unless, therefore, there was an alteration in the state of mind of Hurree Pershad, between the 15th August 1831, and the time of his death, the alteration in the date cannot, as it seems to their Lordships, have been material ; and as to the other alleged erasures in the names of the witnesses to the deed, it is to be observed, that the Sudder Ameen does not at all refer to them. He appears, in his judgment, to have relied upon the circumstance of Hurree Pershad not having himself adopted Rada Pershad ; but their Lordships do not consider that the mere fact of non-adoption by Hurree Pershad himself weighs much against the validity of the deed. Many circumstances may have induced Hurree Pershad, rather to trust the adoption to his widow, than to make it himself ; and no instrument, giving a power to adopt,

could be held valid, if the non-adoption by the party making the instrument be held to prevail against it. Reliance was also placed on Soondur Koomaree having, soon after the death of Hurree Pershad, claimed as heir in the suit 6,996 ; but it is to be observed, that, at this time, the adoption had not been made : and besides, from what has been already stated, it appears clear that the Unomuttee Pottro was in existence in the life-time of Hurree Pershad. Some reliance appears also to have been placed upon some slight discrepancies appearing in the evidence of the witnesses examined on the part of Soondur Koomaree ; but in their Lordship's judgment, such discrepancies tend rather to support, than to discredit, the testimony of those witnesses. There are also other slight circumstances on which the Sudder Ameen has relied, which do not appear to their Lordships to require any comment ; but the Sudder Ameen in some degree relied, and the Sudder Court almost wholly relied, upon the inconsistency of this deed—that the gift of the property to Soondur Koomaree was at variance with the power of adoption given to her. This, no doubt, is a circumstance to which, if unexplained, great weight would be due, but the circumstances of this case appear to their Lordship to explain it. It is obvious that in the state of the relations existing between Hurree Pershad, and Gudadhur Pershad, the natural desire of Hurree Pershad would be to prevent his property from falling into the hands of Gudadhur Pershad, into whose hands it would have gone if he had not otherwise disposed of it. That this was the feeling of Hurree Pershad appears from the evidence of Gudadhur Pershad's own witness, Bheekum Sing, who, upon his examination, states :—

“ Formerly, when the defendant and Hurree Pershad Tewarree were joint in mess, I was in their employ. On the death of the defendant in the year 1230, there was a partition made of the zemindaree, &c., in the year 1231. After that both the parties were in possession of their shares. In the year 1238 Hurree Pershad Tewarree became very weak from illness. I had left the service then, and was not in employ, but frequented him still ; when I used, Hurree Pershad Tewarree was indeed very weak. One or two days before his death, I and many others had gone to see him, and at the same time Gudadhur Pershad Tewarree had also come to see him, when he said to Hurree Pershad Tewarree, ‘ You are very weak ; what are you doing with the zemindary ? ’ ”

On this Hurree Pershad said, ‘ I have a wife ; she will sustain my honor. I have transferred the whole to her by writing.’ On hearing this the defendant went away in a rage. ‘ I also went away. The other people also left the place.’ ”

The evidence of this witness is the more material as it shows that Gudadhur Pershad was aware of the execution of this deed even in the life-time of Hurree Pershad ; and this leads us to the consideration of his conduct. Knowing of the existence of this deed, as appears by the evidence of this witness, by his answer, and by the petition already referred to, he instituted no proceedings until the 9th of August 1834, and then only when he had been sued by Soondur Koomaree, and was called upon to put in his answer in the suit instituted by her. This question, therefore, as to the validity of the deed of *Unomuttee Pottro*, appears to their Lordships to be reduced to the question of the alleged insensibility of Hurree Pershad ; and on this point their Lordships fully concur in the opinion of the Sudder Ameen that no credit whatever can be given to the testimony of the witnesses examined on the part of Gudadhur Pershad upon the subject. Their Lordships have thought it right to examine this case with reference to the evidence on the part of Gudadhur Pershad ; but, having done so, they think it right to add that they are disposed to attach more weight to the evidence on the part of Soondur Koomaree than the Sudder Ameen appears to have done ; they see nothing to impeach the evidence of Ram Mohun Sircar, upon whom the Sudder Ameen, in the copy of his judgment printed in the Appendix to the first appeal, casts no imputation whatever. It is true, indeed, that in the copy of the same judgment, printed in the Appendix to the other appeal, he is made to speak of him in these terms :—

“ Witness, Ram Mohun Sircar, is one of those attached to the Court for the purpose of giving evidence and is not worthy of reliance. Without even looking to the conflicting nature of the testimony of each of these witnesses their evidence in my opinion has no weight in this case.”

• • Their Lordships, however, are not disposed to place reliance upon this latter copy of the judgment ; for they find that in the reasons of appeal presented by Soondur Koomaree against the judgment of the Sudder Ameen there is the following passage :—

“ The Principal Sudder Ameen, after his deep research could state nothing against Ram Mohun Sircar, my witness, and a vakeel of the Court, in his decision, except that nothing could be carried by the evidence of a single witness.”

And that, in the answer to these reasons, there is no mention made of any such observation having been made by the Sudder Ameen, as appears in the second copy of the judgment.

Upon the whole, therefore, their Lordships are of opinion that upon the first appeal the decisions of the Sudder Court and of the Sudder Ameen ought to be reversed.

The case, however, between these parties does not require that any decision should now be given as to the rights of parties who may become entitled after the decease of Soondur Koomaree ; and feeling, for the reasons which have been already assigned, that these rights (if any) will be better investigated in India, their Lordships are not disposed to go farther than the necessity of the case requires. They intend, therefore, upon the first appeal humbly to recommend to Her Majesty that the decrees of the Sudder Court and of the Sudder Ameen be reversed, and that in lieu thereof the decrees stand and be as follow :—

“ It appearing to their Lordships that Gudadhur Pershad cannot, under any circumstances, have any right to the property in question in this suit during the life of Soondur Koomaree, it is ordered that the suit be dismissed without prejudice to any question as to the rights of Gudadhur Pershad (if any) after the death of Soondur Koomaree, and without prejudice, also, to the rights (if any) of any person not before the Court in this cause, either in the life-time, or after the death, of the said Soondur Koomaree : and their Lordships will order Gudadhur Pershad to pay the costs both in the Zillah and Sudder Court.”

Upon the second appeal, that of Gudadhur Pershad, three points were raised :—

1. That all the accounts had been settled up to the time of the partition, and that the appellant, Gudadhur, had been improperly charged in respect of his receipts before that time ; and, further, that he had been improperly charged with rents which he had not received.

2. That he had been improperly charged with a moiety of a fine which had been paid to Government, and afterwards re-paid to him ; and,

3. That he had been improperly charged with the amount and value of property which had been abstracted from the malikana, or treasury, in the year 1830.

The second point was abandoned at the hearing ; upon the other two points it is unnecessary to say more than a few words. It appears to their Lordships, from the partition papers, to be clear that accounts were to be afterwards rendered, and their Lordships see no evidence to show that any such accounts ever were rendered, and certainly none to show that any such accounts were settled ; nor do their Lordships find that it is alleged by the answer, that there ever was any settled account : and with respect to the rents, the appellant being in possession, was bound to keep the accounts of his receipts, and not having produced any such accounts, is properly chargeable with the full rents. There remains then only the third point, as to which, upon carefully looking into the evidence which was referred to on the part of the appellant, their Lordships are fully satisfied that the property abstracted from the malikana was not stolen, as the appellant has alleged, but was possessed by the appellant himself. Their Lordships are, therefore, of opinion, and will humbly recommend to her Majesty, that Gudadhur Pershad's appeal be dismissed, with costs.

The 16th February 1858.

Present :

The Judge of the High Court of Admiralty, the Chancellor of the Duchy of Cornwall, Sir E. Ryan, and the Judge of the Court of Probate.

Evidence (Copies of Documents)—Amaram Grants (Resumption and Assessment of).

On Appeal from the Sudder Dewanny Adawlut of Madras.

Unidi Rajaha Raje Venkataperumal Rauze Bahadoor, Zemindar of Karvetinuggar,

versus

Pemmasamy Venkatadry Naidoo and others.

With regard to the admissibility of evidence in the Native Courts in India, no strict rule can be prescribed as in the Courts in England.

A copy of a document coming out of a public office, and certified by the Officer in charge of that Department to be a true copy, is admissible in evidence.

An amaram grant is resumable at the pleasure of the zemindar. The grantees of such a grant, when resumed, if they remain in possession without payment of the assessment which they are lawfully bound to discharge, are liable to be sued for such arrears of assessment.

CONSIDERING that the decision in this case may affect a very considerable amount of property, besides that which is the proper subject of the suit, and seeing that the two tribunals in India have pronounced conflicting judgments, we should, had we entertained any doubt whatever as to the advice which we should tender to Her Majesty, have been anxious to have heard a reply, and to have taken time for consideration; but the case is, in our judgment, so clear that only one result can possibly be come to, and therefore we proceed at once to declare the opinion we have formed upon the questions before us.

This is an appeal from the Sudder Adawlut Court of Madras. The parties are the zemindar of one of the four western zemindaries of Arcot, the original plaintiff, and now appellant, and certain persons occupying lands within the zemindary, defendants, and now the respondents. The suit commenced in 1848 in the Zillah Court of Chittore.

The plaint stated that the zemindary was originally granted by the Rajah of Arcot to the ancestors of the plaintiff; but, on the accession of the British Government, that grant was confirmed under certain conditions. It then sets forth that certain grants were made to the ancestors of the respondents, in the nature of "amaram" grants; that these grants were resumable; and that in the year 1840-41 the plaintiff resumed those grants, and required the respondents to pay the full assessment on their lands; and it concludes by stating that the demand is for 13,597 rupees, being the amount due on such assessment, including interest.

The answer of the respondents is to the following effect: that their ancestors rendered great services to the ancestors of the plaintiff; that, in requital for this service, a grant was made to them of several districts, then a jungle, amongst which lands is the village in question; but they deny that they held it on condition of rendering any service, or that they rendered any; and allege that they hold it under a "sunnud" from the appellant's ancestors. They then state that this action ought not to have been brought for the recovery of the arrears, but ought to have been brought for the village itself.

They do not deny that a *jodi* was paid for the village, but allege that that *jodi* was fixed and permanent, and never was, or could lawfully be, increased. They distinctly deny the power of the zemindar to resume or alter the grant enjoyed by them.

The reply calls upon the Court to ask for the document under which the respondents allege they held the village, and refer to various facts and circumstances

as tending to establish the appellant's right, as set forth in the plaint. There is a rejoinder on behalf of the respondents, which is, as the other pleadings are in great part, arguments on evidence to be produced.

It seemed prudent to the advisers of the appellant to file a supplemental plaint for the recovery of the village.

The real question between the parties is—under what tenure the respondents held the village? On the part of the respondents they say it was an *enam* tenure. The appellant contends that it was an *amaram* tenure.

Before proceeding farther, it may be expedient to consider the nature of these tenures, and the incidents consequent thereon.

There has been much controversy, in argument at least, as to the meaning of these words, though we find no such doubt in either the Zillah or Sudder Adawlut Courts. We apprehend that the word *enam* originally meant a grant generally; that such grants were of various description—as an *altumgha enam*, which meant a grant in perpetuity, not resumable by the zemindar. That there were various other grants as set forth in the statement of Mr. Stratton, as grants for religious or charitable purposes; and also to other descriptions of grants, called *amaram* and *kattubady*, and that the latter grants were grants resumable. Probably, in process of time, when the word *enam* alone was used, it meant a grant in perpetuity, not resumable. But there is not the least reason to suppose that when the term *amaram* was applied, it did not mean a grant resumable at the pleasure of the zemindar. We think that this explanation will, in very great measure at least, be confirmed by the reference we shall presently make to the evidence in the cause. For instance, in the judgment of the Zillah Court, page 180, paragraph 6, the Judge states that the defendants contend that the grant was not a service *enam*, evidently showing that *enam* was a word to be qualified according to its own conditions. That an *amaram* grant was resumable, is assumed throughout the judgment.

The title of the appellant to the zemindary is not a matter in dispute; but we will refer to the documents upon which that title is founded, in order to ascertain the powers which he was authorized to exercise under that title.

What were the powers of a zemindar, of one of these zemindaries, prior to the year 1802, it might be difficult to define with perfect accuracy; but we may presume, as we think we are fairly entitled to do, and with no disadvantage to the respondents, that they were at least commensurate with the powers stated to belong to a zemindar in 1802. The most important documents on this subject are—*first*, the letter of Mr. Stratton, the Collector of the Northern Division of Arcot, to the Board of Revenue, which is dated July 14, 1801, and to be found at page 50: in the 14th paragraph of that letter, he states that the *polygars*, that is, the zemindars, are at liberty to resume the *amaram enams*, without assigning any reasons whatever, the word *amaram* being used as an adjective.

The next document, and a most important one it is, is dated 24th August 1802, and is produced by the defendants; and it may be remarked, by the way, that it is verified as a true copy by Mr. Bourdillon: it is marked number 146, and is to be found at page 177: it is a letter from Lord Clive, then Governor of Madras, to the then zemindar of this zemindary. That document states that from 1792 the zemindary was subjected exclusively to the British Government; that the established *pice-cush* alone was paid, and that the zemindary was free from all other charge except the Military establishments; it proceeds to relieve the zemindar from all Military service, and to fix a payment instead: and this letter further states that a sunnud, fixing the sum of star pagodas to be paid, is transmitted. At paragraph 7 of this letter Lord Clive refers to the revenue which will revert to the zemindar from the *amaram* peons; or, in other words, he points out that the Military service on which such *amarams* were held, being discontinued, the revenue would revert to the zemindar.

Paragraph 11 is to the same effect.

At page 163, No. 133, will be found the document, the sunnud mentioned in that letter. It sets forth the facts already stated, provides for a transfer by a sale or gift, commits the Police to the zemindar, requires engagements with the ryots to be in writing, and confirms to the zemindar in perpetuity the zemindary.

The next document is No. 49, page 52—letter from Mr. Stratton, dated January 1807, and in that letter he expressly declares that *amaram* grants were resumable.

Now, without going farther, the following facts appear to be established :—

1st. That the appellant is the zemindar of the zemindary, with the authority, and under the obligation, already stated.

2ndly. That the lands in question are within the zemindary.

3rdly. That the respondents hold under a grant either in perpetuity or resumable.

4thly. That *amaram* grants are resumable at pleasure.

It may not be necessary in this case to consider minutely upon whom the *onus probandi* is—under the circumstances stated—thrown : it is more convenient to look at the evidence in the case, and to see what the result is, when all the facts proved in evidence are taken into consideration. We will proceed then to respondents' evidence as to their title to a grant in perpetuity, or what is called, in these proceedings, an *enam* grant.

It must be recollected that in the defence of the respondents (page 4, No. 7), they state that they and their ancestors enjoyed this property under the sunnud granted by the appellant's ancestors, and that they paid the prescribed *roosums*. Now the only document upon which any reliance can be placed in support of this avowal, is to be found at page 65, numbered 62. It is difficult to say from whom this document comes, or to whom it is addressed. The Zillah Court (page 183) apprehends it to be an order from the chief officer of the then zemindar to the respondents' ancestor. Now this document has neither grantor nor grantee, nor are there any words of grant in it, nor any conditions of any kind : it is simply a statement of certain limits to certain villages, concluding with an order that they should be reclaimed through Yellore Vama Naidoo.

Giving the utmost latitude of construction to this instrument, it appears to us wholly impossible to contend that it is a grant of any description whatever, though it may be a direction that the ancestors of the respondents should be permitted to reclaim the lands in question. There is no other documentary evidence whatever to establish the respondents' title, and, therefore, we must presume that this document, No. 62, is the sunnud, or grant, upon which they rely, as mentioned in their answer to the plaint.

The claim of the respondents, therefore, is founded upon an existing grant, and the case is not, and cannot be, assimilated to a claim founded upon a long continuous possession, where the title-deed is alleged to have been lost, and, therefore, that its existence and contents might be presumed.

There is no such averment in this case, neither is there any other documentary evidence whatever tending to prove any grant. We must now turn our attention to documents brought forward by the appellant.

In considering the further evidence produced, the document entitled to the greatest weight, provided it be clearly admissible in evidence, is No. 36, page 15. That document purports to be a *kyfiet*, addressed to the Honorable Company, and to have been given by the third defendant in this case ; it is dated July 19, 1842, and is certified to be a true copy, signed "J. D. Bourdillon, Collector ;" and it is an admitted fact that Mr. Bourdillon was appointed Collector in 1848, about the time when this suit commenced. Objections have been taken to the admissibility of this document as evidence, and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value the

rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice, we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and, more especially, where we find that it has been the practice of the Court to receive documentary evidence, without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence, not only in this case, but almost in every other. Looking through the whole of these papers, we see that, both on the side of appellant and respondents, copies of documents coming out of a public office have been received upon the certificate that they were true copies, signed by the officer in the charge of that department, and that whether produced by the plaintiff or the defendant in the cause.

We entertain no doubt, therefore, that this document (No 36, p. 15), must be received in evidence; but what weight is to be ascribed to it still remains to be considered; all we know of it at present from the certificate of the Collector is, that it is a copy of a document remaining in his office, whether the copy of an original, or of the copy of an original, at present *non constat*. It has been contended on the part of the respondents, that it is a document of no authority, being merely the copy of a copy; but they have not in their pleading denied its authenticity, nor have they produced any evidence to prove that it is undeserving of credit, nor is it impeached in either of the judgments. Now, whether this *kyfiet* was given by one of the defendants or not, is a fact within his own knowledge. This document, however, is attempted to be impeached through the medium of the evidence of one of the appellant's witnesses, and to that evidence we shall now direct our attention.

That witness was a *samprattee*, or accountant, under the zemindar, and he was cross-examined on behalf of the present respondents, and the commencement of that cross-examination relates to certain *sunnuds*, and is to be found at page 83.

After that cross-examination at page 85, he is questioned as to this *kyfiet*. He states the contents of that *kyfiet*; that it was given to the Seristadar, and forwarded by him to the Collector; and that he has a copy of it. He is asked when he got the copy. He says it is in a book which was returned to the zemindar by the Collector, and he says he has brought that book. He says the copies of the *sunnuds* were taken when the defendant gave the *kyfiet*, and were there in the book, and that no copies were kept in the Collector's office, either of the *sunnuds* or other vouchers. He is asked whether the copies of the *kyfiet* and *sunnuds* entered in the book bear the signatures of the Seristadar, or of one of the defendants; and he says, no. He is asked whether they bear the signature of the Collector to prove that the book was returned from the Collector's office. He says they do not.

Now it is perfectly manifest, upon consideration of this evidence, that it in no degree whatever proves that the document No. 36, page 15, was the copy enquired of by the question; but, on the contrary, that the questions put to this witness related to the book by him produced, and the copies therein contained, and not to the document No. 36; and this is more especially evinced by his deposing that the copies of which he was speaking did not bear the signature of the Collector; whereas upon the face of the document No. 36, it does bear that signature.

This evidence, however, is of importance, and great importance too, to show that the original *kyfiet* was deposited in the Collector's office, and that No. 36 is a copy of that original. In answer to the 55th question the witness swears that the original was forwarded to the Collector.

We entertain no doubt whatever that No. 36 is entitled to be received as evidence in this case, and we proceed to consider its contents, and the inferences to be drawn from them.

It is not denied that this *kyfiet* was given by one of the respondents, and he describes himself as an *amardar*. This *kyfiet* states the history of the family and of the grants made to them, and it especially refers in the 3rd paragraph to a sunnud of July 31, 1798, to a grant under *amaram* tenure, stating it to be *doombal-la*, or rent-free *kandighy*, and in paragraph 6, which more especially relates to this property, the grant is stated of this village to be under *amaram* tenure, with a *joadi* of 50 star pagodas, under a sunnud, dated April 1, 1818. Paragraph 11 refers to a sunnud, dated July 13, 1835, relating to another grant of this village.

This is a very brief summary of the contents of this document. It is a possible case, looking at the extensive powers with which the zemindar is invested, that the grant being originally *amaram*, and resumable, might, when the Military Service was dispensed with, and circumstances had changed, have been converted into a perpetual grant upon a fixed payment. Had this been the case, it ought to have been distinctly pleaded, and the grants themselves, if produced, would have shown whether such defence could be supported.

Now, bearing in mind that this is a document coming from the defendants themselves, and setting forth the sunnuds under which they hold the property, and claiming in 1842 rights in respect thereof, we necessarily ask why the defendants have not produced those documents? In every view of the case it was incumbent upon them so to do : *first*, as tenants of the zemindar, holding property under him ; *secondly*, as being in possession of the titles upon which they held their property, and on which in this document they found their claims.

In the argument which was addressed to us from the Bar, we have not been able to discover any reason whatever why this obligation has not been fulfilled. Much time has been occupied in endeavouring to prove that the copies of these sunnuds produced by the appellant ought not to be received in evidence ; whereas it had been much more beneficially employed in showing, if it had been practicable, why the respondents had not produced in evidence the very documents which they vouched as their titles.

As to the parol evidence of the respondents, it is clearly entitled to no weight whatever ; indeed, it is wholly inadmissible. How can we receive parol evidence of the contents of documents from those who have the custody of those very documents ? We need not add that such parol evidence is in direct contradiction of the respondent's own statement in No. 36.

Now, if the case rested here, to what conclusion must we necessarily come ? Why, that the respondents held under *amaram* tenure, and if they held under *amaram* tenure, it is equally clear that such grants were resumable at pleasure : if this be not the true construction to be put upon their own representation, it is the fault of the respondents themselves that they did not produce those very documents which, upon a perusal of their contents, would have set the question entirely at rest.

Such being the necessary inference to be drawn from the case, so far as we have considered it, we deem it wholly unnecessary to enter into an investigation of the subsidiary evidence, not that we mean thereby to say that any part thereof ought to be rejected, but that it is not necessary to take it into our consideration.

We do not, therefore, expend time in considering the admissibility or weight of the copies of the sunnuds produced, nor of the *jemabundy* accounts, or the muster-rolls, and much less is it necessary to look to the parol evidence of the appellant. We have the admission of the respondents themselves that they hold under *amaram* grants, which, in the absence of all evidence to the contrary, are resumable grants ; the grants or sunnuds themselves are their own proper evidence to clear up any difficulty ; and those they have not produced. We have no hesitation,

therefore, in coming to the conclusion, that the respondents held under grants which were resumable at the pleasure of the zemindar.

The question of resumption remains to be disposed of. The contest in these papers is, whether what is called an attachment took place or not ; the precise meaning of this word attachment is not explained. We apprehend the fact to be, that so long as the lands remain in the actual possession of the respondents, upon payment of a certain *kist*, and the rendering certain services, the zemindar, though entitled to resume, was of course bound to give notice, and that in some public form. The resumption consists in putting an end to the grant under which the respondents held, remitting the services, and requiring them to pay the full assessment. It does not appear that an absolute dispossession was either attempted or intended, though means were taken to prevent the respondents reaping the crops.

In the account for 1831, p. 30, there is an entry of a *joadi* paid by the respondent Naidoo of 50 pagodas, increased 30 pagodas.

In No. 44, p. 30, accounts for 1841, there is no entry of payment of *joadi* at all. This is the year in which it is alleged the resumption took place. At p. 34 in this account, will be found a statement that the village having been taken under attachment, certain accounts were not furnished. Now, this entry is strong evidence to show that an attachment did take place in 1841. We see not the least reason to suppose that this document is not genuine and trustworthy, nor the slightest cause to suspect that such an entry as this could be forged for the purpose of this suit. Whether it be the attachment of the zemindar or of the Circars is not so certain.

There is a document relative to this question on which the respondents have greatly relied, and which, therefore, it may be desirable to notice. It is No. 63, II, p. 66, proceeding from the Sessions Court of Chittoor, and dated the 19th July 1849, produced by the respondents, though erroneously classed with the appellant's evidence. It appears from that document that certain *enamdars* of the village in question have been fined by the Magistrate for a riot ; one of them was a respondent in this case ; the alleged riot was in September 1848, the charge being that the respondents molested the appellant's servants when they went to take the account of the lands.

The Head Assistant Magistrate was of opinion that the zemindar was justified in pursuing this course under an order of the Collector, and fined the tenants, and the Magistrate confirmed this order.

It appears to have been appealed to the Sessions Court, and that Court was of opinion that the order of the Collector was simply to attach the property of ryots or others in arrear as prescribed by the Regulation. The Court thought the zemindar was the first trespasser ; that there had been no regular attachment of the village, and set aside the fine.

The importance of this document is the denial of an attachment : but be it remembered that the plaint was filed on the 21st of October following.

It is remarkable that the Judge of the Sessions Court was Mr. Lovell ; and that this same gentleman was, in 1850, the Judge of the Civil Court of the Zillah of Chittoor ; that he had to decide upon this very question, attachment or no attachment ; that being the first issue before him, p. 183. He held that the attachment was proved, and he relies upon the evidence, documentary and parol, therein cited.

The first document is No. 129, p. 163, being an order in writing from the zemindar to the amildar to resume the lands. This order is dated June 1840, and is proved by the eighth witness, page 165.

The document proves the intention of the zemindar to resume.

The parol evidence is to the following effect :

The third witness for the plaintiff, at p. 72, deposes to the fact of the village being sequestered about 1842, and from the subsequent question it is apparent that the sequestration and attachment mean the same thing.

This witness was present when the zemindar ordered the resumption of the village, though not at the actual resumption. (Question 19, and Answer, p. 71.)

It is proper to observe that, prior to the resumption of these grants, various services fully set forth were remitted to the respondents.

The fourth witness saw the order of resumption written, though not present at the resumption. (Question 39, p. 74.)

Many witnesses depose that from the time of the resumption the personal services ceased, amongst other duties were those of attacking tigers (p. 77.)

The eighth witness (p. 80) gives very important testimony: but after the decision we have already come to as to the description of the tenure under which the respondents held, it is not necessary to refer to that evidence save as bears on the question of resumption or attachment.

This witness gives a detail of the various sunnuds under which this village was held from 1798; but we need not travel through this statement.

It appears that in 1831, when the property was under the management of the Court of Wards, the former joadi of 50 pagoda was raised to 80; that the respondents, or their ancestors, continued to hold the village on service tenure, at a joadi of 80 pagodas, till the 13th of May 1840, when, according to the evidence of this witness, a resumption took place, and has ever since continued. He annexes the account showing what is demanded.

One of the respondents was from 1839-40 monigar of the village till 1846-47, and it was his duty to collect the revenue. Part of the time, *viz.*, in 1842, the zemindary was under Circar attachment. In 1845-46, in consequence of the alleged resumption, demand of the arrears was made from the respondents.

In answer to the 79th question, p. 87, he states, he was not present at the resumption; that the village has been in the respondents' possession since Keelaka (January); prior to that year in that of the zemindar.

Several of the witnesses speak in general terms to the resumption of the village.

The 13th witness, a monigar, proclaimed the resumption, and carried out the order (Top of p. 120.)

The deposition of the 14th witness, p. 126 explains the whole transaction in answer to the 14th question. The village was attached, and the defendants directed to collect the revenue according to the rules observable when a village is under attachment, and this accounts for the respondent remaining in possession.

The 17th witness saw the attachment published (p. 153, question 21).

The document 44 tends (p. 163) to establish the truth of these statements: for it proves that in 1843 a representation was made to the Collector by the officers of the zemindar; that, though the joadi was paid, the remainder, that is the assessment, was withheld.

The only contradiction is, that the two first of the defendants' witnesses say they never saw the village resumed. The 3rd witness knew nothing about it, nor the 4th.

Then what is the result of our examination into this question of resumption or attachment? We are not told in any of these papers, that the law has prescribed any particular form in which such resumption shall take place; nor if there was such a form prescribed by law, that it has in any specified particular not been complied with. Of course justice requires that a resumption should take place with due publicity and upon reasonable notice. We have abundance of evidence that a formal instrument of resumption was executed by the zemindar, that such resumption was publicly proclaimed; that the defendants were allowed to retain possession, but required to pay the full assessment; but when they were in default, complaint was made to the Collector that the zemindar took forcible measures, perhaps erroneously, to obtain his claim. All the accounts correspond with the evidence of the witnesses; and against this, is only the isolated fact that Mr. Lovell, upon one occasion, with imperfect information (for the case was one of a riot),

thought that no regular attachment had issued—an opinion which he altered when the case came regularly before him, and he was supplied with that evidence which before had been deficient. It is true that the Collector, when the zemindar complained that he could not pay the “pice cash” by reason that the defendants withheld their payments, expressed an opinion that the grants could not be resumed, and that an attempt to do so would lead to litigation; but this was merely the opinion of the Collector, manifestly ignorant of the true state of the case.

In the judgment pronounced by the Court of Sudder Adawlut, they say that the probability is that the attachment never actually took place, although there was, no doubt, an attempt made to effect it (page 202, paragraph 15). At all events, they say the village appears never to have been taken out of the possession of the respondents; we cannot think that this reasoning ought to prevail against the evidence of the case. The respondents, if left in possession at all, were in possession as the servants of the zemindar, and on condition of collecting the revenue.

The short history of the case is this: that the respondents were grantees under resumable grants; that those grants were resumed; that they remained in possession without payment of that assessment which they were lawfully bound to discharge, and for such arrears of assessment this suit is brought. We are of opinion that the decree of the Zillah Court was well founded in all respects, and, therefore, we must humbly advise Her Majesty to reverse the decree of the Sudder Adawlut, and with costs. The decree of the Zillah Court will be affirmed.

The 22nd February 1858.

Present:

The Judge of the High Court of Admiralty, the Chancellor of the Duchy of Cornwall, Sir E. Ryan, and the Judge of the Court of Probate.

Evidence.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Bunwarree Lal,

versus

Hetnarain Sing.

The general fallibility of Native evidence in India is no ground for concluding against a transaction when the probabilities are in favor of it.

The Privy Council, whilst lamenting the great latitude with which documentary evidence was received in India, held that it would be contrary to justice in any particular case to visit upon an individual penal consequences by way of costs, because the administration of justice was not more strictly conducted with reference to the admission of evidence.

THE sole question in this case is, whether the appellant has produced adequate proof that a document upon which he relies is a true and genuine instrument. It is not denied on the part of the respondents that, if that document be genuine, the effect of it will be to exonerate the appellant from the demand made against him; nor is it said on the part of the appellant that he would not be liable if not protected by the document in question.

It has, we think, been truly urged on behalf of the respondents that the *onus probandi* lies upon the appellant: it is not necessary for the respondent to contend that the instrument is forged; it is sufficient to say that there is a *deficit probatio*.

Amongst other arguments urged for the respondents it was said that, with regard to instruments of this kind, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, the probability or improbability of the transaction formed a most important consideration in ascertaining the truth of

any transaction relied upon. With this argument we agree ; and, therefore, it will become our duty to examine with care how far the defence relied upon is consistent with all the probabilities of the case.

It has been said also that this defence stands exclusively upon oral evidence ; and though to a considerable degree that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon the proof of a given instrument : but there is a very clear distinction, and not an unimportant one, between the pleading a written instrument as an answer to a demand, and the setting up a defence founded exclusively upon oral evidence ; for instance, if the defence were adoption where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it ; but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence ; and, moreover, the witnesses who are to prove a written document cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence.

There are more means of trying the genuineness of a written instrument than there can be in disproving purely oral evidence. This is quite manifest, even upon the present occasion, for the truth of the transaction may, as it has been, be investigated by reference to the handwriting, to the seal, to the stamps, the description of the paper, the alleged habits of him who is said to have written it.

It is now expedient to investigate the facts of the case, with the view of discovering what is probable and what is not. It appears that the Maharajah Mitterjeet Sing, before the year 1825, had purchased a certain talook. Mitterjeet Sing was the father of the present respondent. In this property other persons were interested. Ghokal Chund was the proprietor of a fourth share under an asserted auction-sale, and the present appellant purchased that share of him. A suit had been instituted against Mitterjeet Sing and the other asserted proprietors before this last purchase. The Provincial Court of Patna set aside the auction-sale, and the present appellant intervened in that suit after that decree, and filed a petition of appeal to the Sudder Adawlut, as did Mitterjeet Sing and the other asserted proprietors. On April 24, 1832, the Court of Sudder Adawlut affirmed the judgment of the Court below.

Mitterjeet Sing appears to have been a person of high rank and great wealth, and also to have enjoyed a high character for his integrity. In the suit to which we have adverted, some serious imputations were made against him. Mitterjeet Sing was very deeply interested in this suit, both as concerned the property at stake, and the exoneration of his character from the charges preferred against him. He had, therefore, the strongest motives for the most effectual prosecution of an appeal to the ultimate tribunal.

The present appellant was in a very different position. His share of the property was but small, and, if evicted from it, he had his remedy over against the vendor. He had already experienced the evils of a suit in two Courts, and it appears to be quite consistent with prudence and the ordinary motives by which men are actuated, that he should not have embarked afresh in a long and renewed litigation.

The appellant alleges that, under these circumstances, Mitterjeet Sing urged him to become a co-appellant, so that the appeal might be prosecuted in the names of all aggrieved by the decrees in the Courts below ; and that, to induce him so to do, Mitterjeet Sing offered to indemnify him from all costs. The respondent contends that such alleged transaction was improbable, because Mitterjeet Sing might have effectually prosecuted his appeal without the appellant being joined in it ; and that, therefore, Mitterjeet Sing had no adequate motive for indemnifying the appel-

lant. Now, it is true Mitterjeet Sing might have prosecuted the appeal solely and without the name of the appellant; but we are of opinion that, though this position is legally true, yet that there was an adequate motive under the circumstances for the anxiety of Mitterjeet Sing to retain the appellant as party to that appeal. We think that it was by no means contrary to probability that Mitterjeet Sing would conceive that his case would be damnified if the appellant withdrew from the suit; he might well suppose that his own case would be injuriously affected by the secession of a party standing, in some respects, in a similar predicament. It may be true, legally speaking, that he would not be so, but we think that he had rational grounds for believing that such would be the case; indeed, we doubt whether, even in this country, such an opinion may not have been entertained. We, therefore, think that the wish of Mitterjeet Sing to retain the appellant in the suit was rational, and his proposal to indemnify him probable; and we might further observe that Mitterjeet Sing must, in any case, have incurred the main expense of the proceedings in the cause; and he might well consider the additional costs of the present appellant worth the countenance and support which he might derive from the continuance of his name in the appeal. We have, therefore, upon a review of all these circumstances, come to the conclusion—and a most important one it is in the view of the respondents themselves—that the alleged conduct of Mitterjeet Sing was entirely consistent with probability.

The document itself is to be found at page 39; it purports to be a letter in the handwriting of Mitterjeet Sing, to be sealed with his seal, though not signed. It is dated the 15th May 1832, and the summary of the contents is to desire the appellant to join in the appeal, undertaking to indemnify him from the costs, and stating that he had got a person to execute the security bond. That person is said to have been a son, or a natural son, of Mitterjeet Sing.

The next important question is the time and circumstances of its *production*.

In the year 1842 the decree was pronounced by Her Majesty in Council with respect to the appeal which had been so brought. The decree of the Sudder Adawlut, setting aside the auction-sale, was affirmed; but, from the peculiar circumstances of the case, each party was left to bear his own costs.

This appeal had been conducted under the provisions of an Act of Parliament now repealed; in virtue of that Statute the East India Company conducted the case, both on behalf of the appellant and respondent, and were authorized to recover the costs from the parties in India.

Mitterjeet Sing died pending the appeal; and in March 1843 the Company proceeded against all the appellants and their representatives for the amount of costs they were liable to pay to the Company: further proceedings were had, and in the course of them, in June 1843, the document in question was produced.

It has been contended on behalf of the respondent that the production of the letter at that time cannot be considered as a circumstance favorable to the appellant, nor assisting the probability of his case; because, against the claim of the East India Company, it would not have any operation or effect. Now, this again is legally true—that the guarantee of Mitterjeet Sing could not be a defence to the demand of the Company, but that the present respondent, being one of the parties on whom the demand for costs was made, and which respondent the appellant contended must, by virtue of this instrument, ultimately defray his, the appellant's, share of the costs; that the appellant should on that occasion produce this document, and expect some benefit from so doing, appears to us the most natural and probable line of conduct, considering the loose notions prevailing in India as to the form in which justice is administered. It is by no means incredible that the appellants should believe that the Company would recover directly from the respondent those costs which he might be compelled ultimately to pay.

We think, then, that the production of this instrument came at a very natural time; and so strongly are we of that opinion, that, had it been altogether kept back at that period, we should have thought that the non-production militated

against the appellant. It was produced at the natural time, because it was the first occasion when there was any reason for its production, namely, when the demand for costs was first made.

Then, as to the circumstances attending the production, it is not worth while to consider whether the evidence taken to handwriting is, or is not, admissible. To the benefit of the fact that the appellant then offered to prove the document to be genuine, and of the hand-writing of Mitterjeet Sing, the appellant is clearly entitled. We do not take into consideration the opinion formed, or said to be formed, by the Zillah Court, that the document was proved.

In August 1847, the present suit was commenced, being a proceeding by the respondent, the son and heir of Mitterjeet, to recover from the appellant a certain amount of costs already paid by him, the respondent, and which he would have been entitled to recover if Mitterjeet had not indemnified the appellant.

The appellant pleaded in defence the document in question, and we will now look to the evidence produced: we leave out of our consideration all that has previously passed, excepting so far as relates to the production of the instrument upon a previous occasion, and we proceed to look at the testimony of the witnesses produced in the suit instituted in 1847. At page 39 will be found the evidence of those witnesses: we need not minutely detail the testimony by them given; but the short history of it is this: that Mitterjeet Sing having been informed that the appellant would not join in the appeal, sent Mahadeo Dutt to the appellant to induce him to consent to be an appellant; that the appellant declined to give his consent without a document written by Mitterjeet Sing; that accordingly the document was written by Mitterjeet Sing and sent to the appellant. Speaking now of the evidence of the four witnesses produced to establish this statement, it has been strongly contended that, besides the general objection to oral evidence, the witnesses, considering the length of time which has elapsed since the transaction in question, and the period when they gave their testimony, have deposed with a minuteness of facts and circumstances which could not, probably, have been so deeply impressed upon their memories. It is true that they have given a very detailed description of the transaction in question; but were not the circumstances which then existed calculated to make a deep impression on their memories? Mitterjeet Sing, in whose service they were and with whom they were connected, had been engaged in an important law-suit; he had been ultimately defeated in that suit, and that under circumstances which were very likely to excite strong feeling on behalf of Mitterjeet Sing and all his dependents. We think, therefore, that though sixteen or seventeen years may have elapsed, the impression made of what occurred immediately afterwards, may have been so lasting as to leave a lively recollection of the transaction; and we must further remark that, in evidence so taken, we must allow some degree of latitude for the questions put to the witnesses, and their answers. We do not deem it necessary minutely to go through that evidence: if it be deserving of credit at all, it satisfactorily establishes that the document in question was written by Mitterjeet Sing. There are various reasons which induce us to think that it was credible; we see no reason to suppose, looking at the whole history of the transaction, that it was improbable that Mahadeo should have been sent to the appellant for the purpose of obtaining his consent to join in the appeal, nor that the appellant should decline unless he was indemnified from the costs. The witnesses further depose to the persons who were present at the writing of this document; not one of them has been produced to contradict any part of their statement, either as to the interview with the appellant, or with respect to the making of the document itself: their testimony is wholly and altogether uncontradicted; and yet, if untrue, there seems to be a fair opportunity of proving the falsehood of their evidence.

Some discussion has arisen with respect to the non-production of Mahadeo, and it has been said, perhaps not untruly, that Mahadeo was more properly the witness of the appellant. Now, conceding all possible weight to that argument,

and presuming, which we must say is contrary to all experience in Indian cases, that suitors in those Courts had any knowledge who was the proper witness of plaintiff or defendant, yet what does it come to? If there was insufficient evidence on the part of the appellant to establish a *prima facie* case, that argument might be used with advantage; but if their evidence was sufficient for such a purpose, then it cannot be said that it was indispensably necessary for them to produce further testimony; and this is perfectly clear, that, if Mahadeo were alive and capable of being produced, and would have contradicted the evidence of the appellant's witnesses, he might, as far as appears, have been produced on behalf of the respondents.

Other attempts have been made, and very properly made, to discredit the testimony of the appellant's witnesses. It has been said, and it appears to have been the opinion of persons conversant with the usages and habits of individuals in the high rank of Mitterjeet Sing, that they would not write with their own hand any document of this description. We give due weight to the strength of this objection, confirmed as it is by the opinion of two of the Judges of the Sudder Adawlut; but we feel ourselves also bound to look to the evidence in the cause, and the probability of deviation from this rule under the particular circumstances of the case. We have distinct and uncontroverted evidence that Mitterjeet Sing was in the habit of writing with his own hand: it may be true that there is no accurate description of the species of documents he so wrote, but one of the witnesses brought with him an abundance of papers said to be in his hand-writing, and no demand was made for their production; and further, we think that the nature of the transaction itself, especially if the evidence as to what passed with the appellant be true, renders it extremely probable that, in order to comply with the requisition of the appellant, Mitterjeet Sing would, according to that requisition, have given him a letter in his own hand-writing, and that, even though it might not be his usual habit so to do.

With respect to the letter having been written upon stamped paper, it seems to us extremely difficult to attribute any great importance to this fact either the one way or the other; it depends so much upon what we cannot by possibility ascertain, namely, what passed in the mind of Mitterjeet Sing upon that occasion. It is very reasonable to suppose that he wished the document to be effectual, and that he conceived, in order to render it so, that it must be written upon stamped paper. We cannot attribute to him, or to any persons in his situation, any very precise knowledge of the Stamp Laws of India; assuming him to be an honest man—and such was his character—he would seek to render the document effectual.

With respect to the stamp itself, it appears to have been the proper stamp which would have been affixed in the year 1832, the date of the letter. It is said that such a stamp, even in 1843, might have been fraudulently affixed: it is unnecessary to deny the truth of that proposition; but we cannot presume fraud. All that is necessary to be said upon this point is that, however little weight may be attributed to the stamp in favor of the appellants, it is perfectly clear that the impression of the proper stamp does not tend in the slightest degree to impair the validity of the instrument.

We do not think it necessary to enter into any disquisition as to the seal, for nothing important arises thereon; and, as to the absence of a signature, it is abundantly clear that a signature might have been forged with as much ease, or even more easily than the document itself.

The case came on for hearing before the Civil Court of Behar in May 1849; and the Judge of that Court, being a native, and the Principal Sudder Ameen, pronounced a decree in favor of the appellant, thereby declaring that the document was a genuine instrument. Upon appeal to the Sudder Adawlut, the Judges of that Court differed in opinion; the cause was heard, August 1851, and two of those Judges were of opinion that the decree of the Inferior Court ought to be reversed—

the other Judge expressed a different opinion, and in affirmance of the decree of the Court below.

In the preceding observations we have discussed, as we believe, all the important reasons assigned by the majority of Judges in support of their decree. We are very sensible how great a weight ought justly to be attributed to the opinion of gentlemen so much more conversant with the habits and usages of natives than ourselves; but we are not, upon the present occasion, placed in the painful predicament of opposing our own opinion solely against the judgment of those who are conversant with India, for we have to pay due deference also to the judgment of the Zillah Court, and the opinion of the dissentient Judge: however this may be, we are bound to look, with due allowance to the practical knowledge of the Courts in India, to the merits of the case, and to the evidence produced. Then, how does this case stand? We have already expressed our opinion that the whole of the transaction is perfectly consistent with probability; and in support of the genuineness of the document relied on, is the evidence of witnesses against whose veracity no solid objection has been raised, beyond the general observation that oral evidence in India is untrustworthy. This evidence is wholly uncontradicted, and yet, surely, if capable of contradiction, some evidence might have been adduced to impeach its credibility—some evidence either to show that the facts did not take place as stated, or to throw a doubt upon the testimony as to the handwriting. We have no such evidence; we must, therefore, necessarily come to the conclusion that the genuineness of the document is established. It would, indeed, be most dangerous to say that, where the probabilities are in favor of the transaction, we should conclude against it solely because of the general fallibility of native evidence: such an argument would go to an extent which can never be maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes, without recourse to it. We shall therefore feel it our duty humbly to advise Her Majesty to reverse the decree of the Court of Sudder Adawlut, and affirm that of the Zillah Court.

Mr. Wigram, in anticipation of the probability of such advice proceeding from us, has urged that the respondents ought not to be rendered liable to the costs of many documents which he alleges have been improperly introduced on the part of the appellants. Those documents, however, formed part of the proceedings in the Court below, and however unnecessary they may now appear to the just decision of this cause, we cannot undertake to say that they were wantonly or unjustifiably introduced into the Courts below. It is unfortunately too much the habit of those Courts to receive documents, without that just discrimination which would prevail were the rules of evidence known and established; but their Lordships are of opinion that they cannot, in these cases, take upon themselves to determine what ought, or ought not, to have been received in the Courts in India; they may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, because the administration of justice was not more strictly conducted with reference to the admission of evidence; and grievous, indeed, will be the task, and vain will be the attempt, of endeavouring to discriminate in these cases what was the precise course the Courts of primary jurisdiction ought to have pursued. For these reasons we are of opinion that the ordinary rule must be adhered to, and that we must humbly advise Her Majesty to reverse the decree of the Sudder Adawlut with costs.

The 25th February 1858.

Present :

Lord Justice Knight Bruce, the Chancellor of the Duchy of Cornwall, Sir E. Ryan,
and Lord Justice Turner.

**Rajah of Ramnuggur—Hindoo Law—Inheritance—Maintenance—Illegitimate Son
of a Khatri.**

On Appeal from the Sudder Dewanny Adawlut of Agra.

Chuoturya Run Murdun Syn,

versus

Sahub Purluhad Syn.

Held that the appellant had failed to establish the alleged marriage of his father with his mother, and that consequently his claim as a legitimate son of the late Rajah of Ramnuggur could not be sustained; that he was not entitled to inheritance as the illegitimate son of the Rajah, because his father, who was a Rajpoot, was a Khatri or one of the three regenerate or twice born races whose illegitimate sons could not inherit; but that he was entitled to maintenance out of his father's estate.

IN June 1832, Rajah Tej Purtab Syn died, in undisputed possession of the raj and zemindary of Ramnuggur, in the Zillah of Sarun, the right to which raj and zemindary is the subject-matter of this appeal. He left surviving him three widows, and an only brother of the half-blood, Rajah Umar Purtab Syn. A dispute arose between Telotman Dabee, his eldest surviving widow, and his brother, as to who should succeed to the rajdom and estates; but this was ultimately compromised, and Telotman Dabee relinquished her claim in consideration of a certain revenue secured to her for her life. Rajah Umar Purtab Syn continued in possession of the raj and estates until his death in November 1834. Upon his death, Lutchmee Dabee, his widow, obtained possession of the property, and a *wirasutnamah* was filed in her name on the 5th of December following, stating that she was in possession, and claiming for her, as sole heir to the deceased. After the usual proclamations, the Government Collector entered her name in the books of record as the heir and sole proprietor of the raj and zemindary. Subsequently claims were set up to the property by Telotman Dabee, by Oodey Purtab Syn, and by the present appellant, and also by the respondent.

Two suits were commenced: one in August 1835, by Oodey Purtab Syn, against the widows of Rajah Tej Purtab Syn, and Lutchmee Dabee, the widow of Umur Syn, in which he claimed as heir from a common ancestor of the deceased Rajah and himself—one Mukoond Syn. The plaint in this suit is not set out in the transcript, and it is not clear whether the appellant was originally a party, or became so by a supplementary petition (*see* pages 45, 247); but, in the plaint he is stated to be the son of a slave-girl.

The other suit was commenced on the 5th of May 1836, by the respondent on behalf of his son Futeh Buhadoor Syn, an infant, against the widows of Rajah Tej Purtab Syn, Lutchmee Dabee, and Oodey Purtab Syn; and by order of Court of March 1838, the appellant was also made a defendant. This suit was founded on an *Ijzut Puttur*, alleged to have been executed by Umur Purtab Syn, empowering Lutchmee Dabee and his brother's widows to bestow the guddee of the rajdom on the respondent's son.

These suits came on for hearing together before the Principal Sudder Ameen at Sarun, on the 7th of May 1839, and were dismissed with costs. The grounds on which the first suit was dismissed are stated (at page 36) in these words: "That, although Chuoturya Run Murdun Syn was the son of Umur Purtab Syn, yet whether he not being born of a woman of equal caste was entitled to the rajdom during the life of Ranees Umur Raj Lutchmee Dabee, was a question, the investigation of which did not become necessary in this case, because there existed no dispute or disagreement between Ranees Umur Raj Lutchmee Dabee and Run Murdun Syn; but whether Run Murdun Syn was entitled to the rajdom or not, while Umur Raj

Lutchmee Dabee lived, plaintiff had no right to the rajdom whatever on the score of relationship, the zemindary being a separate one altogether." In the suit of the respondent it was held that, as the claim rested solely on the *Ijazut Pultur*, which was found not to be a genuine instrument, it was not necessary to go into the matter of relationship.

From these decisions, Oodey and the present respondent, on behalf of his infant son, appealed to the Sudder Dewanny Adawlat, on the 24th of July 1840. After the appeal, and before any further proceedings, Ranee Umur Lutchmee Dabee died; upon which the present appellant and the respondent, as father and guardian of Futeh Buhadoor, presented to the Sudder Court separate petitions, in which they set forth their respective claims to be considered as heirs to the deceased Ranee. Mr. Reed, the Judge before whom these petitions came, directed the Principal Sudder Ameen of the Zillah of Sarun to receive proof of their claims as heirs to the deceased. In the meantime the estate was attached by the Collector under order of the Judge, and placed under a Manager, and a proclamation issued for the attendance of heirs. Oodey, the respondent, in his character of father and guardian, the surviving widow of Rajah Tej Purtab Syn, and the appellant, attended to prove their respective claims. On the 7th of November 1840, the papers relating to proof of succession were brought before Mr. Reed, and in an order made by him of this date, he states that, as from the decision of the 7th of May 1839, it appears that Run Murdun Syn is the son of Rajah Umur Purtab Syn, but by a woman of unequal rank, it has, therefore, become imperative on him, before going into the merits of the case, to require a *bywasta* (law opinion) from the Pundit of the Court, on the point whether among Hindoos a son by a woman of unequal rank, while lineal relations are forthcoming, will be entitled to inherit the estate of his deceased father, and the Pundit is accordingly ordered to give his opinion on the point. In January 1841, the *bywasta* or opinion of the Pundit is filed; it states, "that among Hindoos of the Rajpoot caste, a son who is not born from a woman of equal rank and caste can be reckoned as son, and will be entitled to the estate of his deceased father, a near relative of lineal descent living notwithstanding, because a Rajpoot is of the Súdra caste, and a son born to an individual of a Súdra caste, even from the womb of a slave, &c., is reckoned his son by the Shaster laws, and is entitled to succeed to his father's estate, a near relation of lineal descent living notwithstanding;" and he also states that if there be no legitimate offspring, that is to say, no issue from a married woman, in such a case the illegitimate son of an unmarried Súdra woman will be entitled to the whole of his father's estate.

This *bywasta* was brought before Mr. Reed on the 5th of February following, and he then proceeded with the further hearing of the cause, and he was of opinion that, although this *bywasta* of the Pundit was in favor of Run Murdun, yet that, considering the claims of the parties, it was inexpedient to dispose of the case summarily without going into its full merits, and he ordered that both cases should be tried together, and that all the objecting parties and claimants should be at liberty to come forward, and that the name of the party whose claim should be found good, should be entered in lieu of the name of the deceased widow.

On the 23rd of May 1842, these proceedings before Mr. Reed, and all the other papers in these suits, were, by an order of the Court, brought before a Full Bench, and the Judges recorded their opinion in these terms:—

"We perfectly agree in the opinion pronounced by the Principal Sudder Ameen in regard the validity of the *Ijazut Pultur*. But as enquiry into the agnatic descent of the appellants in both cases, and the objections made by Chuoturya Run Murdun, and his marriage in a Rajpoot family, has been neglected by the Principal Sudder Ameen, we return the decisions of the Principal Sudder Ameen, dated 7th of May 1839, as incomplete; and, under Clause 2 Section 2 of Regulation IX of 1831, order that the papers be sent back to the Principal Sudder Ameen of Sarun, accompanied with a precept with this order, that he restore both the cases to their

former No. ; and as regards this case, he should enquire whether the marriage of Chuoturya Run Murdun Syn, who declares himself to be the son of Umur Purtab Syn, and whose marriage by the papers appears to have taken place in the village of Bel Ghât, in Zillah Ghomkhpoor, and in the family of Hindoo Sahee, of the Rajpoot caste, had actually taken place in a Rajpoot family, and whether he eats and drinks with them or not ; and whether the marriage of Rajah Umur Purtab Syn with Lutchemmee Dya Dabee, the mother of Chuoturya Run Murdun, was solemnized according to the custom and practice of the family or not ; and after requiring and obtaining from Sahub Parhulad Syn, father and guardian of Futteh Bahadoor Singh, the plaintiff in case No. 80 of 1846, a petition in regard to his agnatic descent, and a genealogical table and documentary proof, and witnesses from both parties, to try and decide the two cases as may be most consistent with justice and equity, as regards the heirship of Run Murdun to the estate of his father Rajah Umur Purtab Syn, and the relationship of the parties according to the genealogical table given in by both."

In November 1842 the respondent filed a supplementary petition, setting forth his genealogy, and claiming in his own right as the next male heir of Purtab Syn.

In February 1845 the Sudder Ameen gave judgment on the re-trial of these causes, and held the respondent to be the nearest next of kin to the deceased Rajah Umur ; that Oodey Purtab Syn, being only remotely related, had not established his claim ; that the marriage of Umur with Lutchemmee Dya Dabee was not proved ; that the appellant, as the illegitimate son of Umur, was entitled to maintenance.

Against this decision, Run Murdun, in April 1845, appealed ; and on the 9th of April 1846, the Sudder dismissed the appeal, affirming the decree of the Zillah Court in all respects, except as to the allowance of maintenance to Run Murdun. This part of the decree was reversed—

From the decree of the Sudder, the present appeal comes before their Lordships, and the appellant objects to the decree.

First. Because he claims to be entitled to the raj and zemindary, as the legitimate son of the late Rajah Umur Purtab Syn.

Secondly. Because if the alleged marriage and legitimacy be not established, he claims to be entitled to the inheritance as the illegitimate son of the Rajah.

Thirdly. That, if not entitled to the inheritance, he is, as the illegitimate son, entitled to maintenance out of the estate, which the Court has disallowed.

In 1838 the appellant endeavoured to establish, by evidence on the first question, that the late Rajah Umur Purtab Syn was married, according to the custom of the family, to Lutchemmee Dya Dabee, and the respondent endeavoured, by evidence, to show that the appellant was the illegitimate son of a slave-girl ; but it is alleged on behalf of the appellant that, to this evidence of the respondent, little credit should be given, because the witnesses also attempted to prove the genuineness of the *Ijazat puttur*, which proved to be forged and fabricated. Upon the re-trial of these cases before the Sudder Ameen in 1845 no fresh witnesses were called by the appellant to establish the marriage, although special directions were given as to the issues on this point ; but many witnesses were called by the respondent to show that no such marriage took place. The Counsel for the appellant have abstained from entering into a review of the evidence given by the witnesses on the *factum* of marriage, but have contended that the legitimacy of the son is recognized by the conduct of the father, by the title given him of Chuoturya—a title assumed, according to the custom of the family, by the heir apparent—and which it is admitted by the respondent he was called, by his living and eating with the father ; by the investiture of the sacerdotal cord ; by what is urged to be a still more important mark of his condition, the admitted fact of his marriage into a Rajpoot family ; and by the great kindness and affection with which he was treated by the late Rajah. No doubt, evidence of this description is entitled to weight as confirmatory of testimony in support of the *factum* of the marriage : but it is not sufficient to out-weigh the

positive testimony of a great number of witnesses called on the re-trial, many of whom are native gentlemen of rank, some of them Rajahs in the immediate neighbourhood, and all of whom speak to the illegitimacy of the appellant from their knowledge of the family, and from the marriage never having taken place at the time and in the manner alleged by the appellant. Their evidence, it must be recollected, was given before a Native Judge understanding the language, usages, and customs of the people; nor is it easy consistently to explain why, upon this issue, the affirmative of which the appellant was bound to prove, no further oral evidence was produced on his behalf. Their Lordships, therefore, are of opinion that no satisfactory grounds have been alleged for disturbing the finding of the Court below on this matter of fact, confirmed by the judgment of the Sudder, and are of opinion that the appellant has failed to establish the alleged marriage of his father with Lutchmee Dya Dabee, and that consequently his claim as the legitimate son of the late Rajah cannot be sustained.

Then arises the second question, whether the appellant is entitled to the inheritance as the illegitimate son of the late Rajah.

There is no dispute as to the paternity of the appellant, and the principal matter for enquiry is the Hindoo Law of inheritance, with regard to the right of succession of illegitimate children.

This law, it appears, varies according to the different classes of the Hindoos, and it is necessary, therefore, in the first instance, to consider what those classes are, and were. It is undoubted that there were originally four classes: 1, The Brahmins; 2, The Khatris; 3, Vaisyas; 4, The Súdras; the first three were the regenerate or twice-born classes, the latter the servile class. It was contended, on the part of the appellant, that the Khatri and Vaisyas classes, have ceased to exist, and were sunk into the Súdra class, and that there are now, two classes only—the Brahmin and the Súdra. The appellant, in order to show that the proper genuine Khatri are extinct, cites as authorities in support of this position “The Ayeen Ackbery, or, the Institutes of Ackbar,” vol. ii, p. 377: “At present there are scarcely any true Khatris to be found, excepting a few, who do not follow the profession of arms. Those among them who are soldiers are called Rajpoots.” Todd’s “Annals and Antiquities of Rajast’han,” vol. i, p. 53, where it is said, “of the fifth dynasty of eight princes, four were of pure blood, when Kistra, by a Súdra woman, succeeded.” “Ward’s Account of the Hindoos,” vol. iv, p. 63: “The Shasters declare that, in the Kalee yooğa there are no Khatris; that only two castes exist—Brahmins and Súdras—and that the second and third orders are sunk in the fourth.” Steele’s “Summary of the Law and Customs of Hindoo Castes,” p. 95: “The Brahmins assert that Pursarum destroyed the whole of the Khatris;” and p. 96: “The Rajpoots, Mahratta chiefs of the Sattara or Bhonsu, and Kolapoor families, &c., and other houses, lay claim to the title of Khatri, and wear the Tenwa, but they are considered Súdras by the Brahmins;” and there is an opinion to the like effect expressed by Mr. Sterling, in a paper on Orissa Proper, in vol. V of the “Asiatic Researches,” p. 195: “The proper, genuine Khatris are, I believe, considered to be extinct, and those who represent them are, by the learned, held only to be Súdras.”

Whatever weight may be due to those authorities in support of a speculative opinion entertained, perhaps, by learned Brahmins and others, their Lordships have, nevertheless, no doubt that the existence of the Khatri class, as one of the regenerate tribes, is fully recognized throughout India, and also that Rajpoots in Central India, and in this district, are considered to be of that class. No doubt, as far as we are aware, has ever been raised in the Courts in India as to the existence of the Khatri class as one of the regenerate tribes. The Courts in all cases assume that the four great classes remain. Thus Sir William Macnaghten, in his marginal note to *Perslad Singh v. Muhesnee*, 3 Sud. Rep. p. 132; (also in transcript, p. 149); says, “According to Hindoo Law, an illegitimate son of a Rajpoot, or *any of the three superior tribes*, by a woman of the Súdra or inferior class, is entitled to

maintenance." In the statement of the case, he takes it as an admitted fact that a Rajpoot is of one of the three superior tribes; although it is true, as has been observed, that the point ultimately decided in this case, was only that the paternity was not established. In the second volume of Macnaghten's "*Hindoo Law*," p. 119, the marginal note is, "The illegitimate son of a person belonging to one of the regenerate tribes (in this case a Rajpoot) is entitled to maintenance only." Accurate information as to the distinction of classes, especially in this part of India, is to be found in the statistical survey of Dr. Francis Buchanan, conducted under the direction of the Government of India. The second volume of Mr. M. Martin's "*India*" contains Dr. Buchanan's report on the district of Goruckpore, and at p. 456 he says, "The Rajpoots are here, everywhere, and by all ranks, admitted to be Khattris, although they claim all manner of descents, except from the persons who, according to the Vedas, sprang from the arms of Brahma." Other passages in the same report have been referred to by Mr. Leith to the same effect. The Rajpoots are mentioned in Elphinstone's "*History of India*," vol. i. p. 607, as the military class in the original Hindoo system; so also in Cunningham's "*History of the Sikhs*," p. 22. Thornton, in his *Gazetteer*, says, "The wide-spread sect of Rajpoots are considered off-shots of the Khattris, one of the four great castes into which the Hindoos were originally divided." Sir John Malcolm in his "*Memoir of Central India*," vol. ii, p. 125, enters fully into the state and condition of the Rajpoot tribes. They are treated throughout his history as belonging to the superior class; he mentions that, although their intercourse with females of a lower tribe may have, in some instances, produced a mixed race, yet even in this class, which he terms the bastard Rajpoot tribes, the lowest of them who aspire to Rajpoot descent, consider themselves far above the Súdras.

In this report of Dr. Buchanan mention is made of the existence of this mixed race in the district of Goruckpore, and that there are several persons of the mountaint-tribe, called Khattris, who are a spurious race, but who claim all the dignities of Military order. One of the witnesses in this case, the Rajah of Gopalpore, a Khatri Kossuck, states that his family do not intermarry with the mountain Rajahs (p. 130). It seems to us, therefore, not only that the Khatri class must be considered as subsisting, but that according to the Hindoo law generally prevailing in this part of India, and independently of exceptions arising out of any well-established usage or custom to the contrary, as to particular places or families, Rajpoots are to be considered as of the Khatri class.

From these premises it seems to us to follow that (it being indisputable that Rajah Umur Purtab Syn was a Rajpoot) the true question to be decided in this case as to the Hindoo Law of inheritance is—not whether the illegitimate son of a Súdra man by a Súdra woman can inherit but—whether the illegitimate son of a Khatri can in any event inherit, whether his mother be a Súdra or of any other caste.

The law relating to the right of succession of illegitimate children, is thus stated in the first volume of Sir W. Macnaghten's "*Hindoo Law*," p. 18:—"Among the laws of the Súdra tribe, an illegitimate son by a slave-girl takes with his legitimate brothers a half-share; and where there are no sons (including son's sons and grandsons), but only the son of a daughter, he is considered as a co-heir, and takes an equal share." In the second volume of the same work, in a note, p. 15, he states: "According to the Hindoo Law, the illegitimate son of a Súdra man by a female slave, or a female slave of the slave, may inherit, but not the illegitimate child of any of the three superior classes;" and he adds, "If the woman was not his female slave, the son begotten of her by him would have no right to the inheritance, but only to maintenance." As an authority in support of the passage in his text, Sir W. Macnaghten refers to Mr. Colebrooke's translation of the "*Mitacshara on Inheritance*;" which, as is well known, is the standard authority on this subject in all the schools of Hindoo Law, from Benares to the southern extremity of the Peninsula of India.

In Chapter 1 Section 12 of that work, "On the right of a son by a female slave, in the case of a Súdra's estate," it is stated: "The author next delivers a special rule concerning the partition of a Súdra's goods. Even a son begotten by a Súdra on a female slave may take a share by the father's choice; but if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property, in default of a daughter's sons." In Section 3, it is stated that the rule does not apply to the three superior or regenerate classes.

Section 3: "From the mention of a Súdra in this place, it follows that the son begotten by a man of a regenerate tribe, on a female slave, does not obtain a share even by the father's choice, nor the whole estate after his demise; but if he be docile, he receives a simple maintenance."

In another treatise on the Hindoo Law of Inheritance, translated also by Mr. Colebrooke, and which is the great authority in Bengal, the "*Dáya-Bhága of Timutaváhana*" p. 151; the same doctrine is to be found. Also in the "*Treatises on Adoption*," translated by Mr. Sutherland, the "*Dattaka Mimánsa*," p. 32, and the "*Dattaka Chandrika*," p. 205; the third volume of Colebrooke's "*Digest*," p. 143; Strange's "*Hindoo Law*," p. 69—132 of vol. i; p. 68 of vol. ii.

A decision on the right, among Súdras, of illegitimate children to inherit, is reported in Sir Thomas Strange's *Notes of Cases at Madras*, vol. ii, p. 305. In his judgment, he says, illegitimate children of Súdras inherit: but in the case of illegitimate children begotten by a regenerate man, the law is different; they are only entitled to maintenance.

It seems, therefore, to be established by an unusual concurrence of authority that, according to the law prevalent where this property is situated, the illegitimate son of one of the three regenerate or twice-born races cannot succeed to the inheritance of his father. We think, therefore, that the appellant's case fails on the second point no less than on the first.

In the course of the argument on this point, great reliance was placed, on the part of the appellant, on the *bywasta* of the Pundit of the Sudder Court, but their Lordships are not disposed to attach much weight to this opinion, as it proceeds on the ground that Rajpoots are Súdras; and their Lordships are fully satisfied that this ground is wholly without foundation.

It was contended, however, on the part of the appellant that, as this case has been presented to us, we ought not now to come to any conclusion affecting the appellant's right, but ought to remit the case to India, for the determination of those rights. It was urged that there has been a miscarriage in the Courts below; that both the Zillah and the Sudder Courts have proceeded on an erroneous assumption; that the only question at issue, as regards the appellant, was legitimacy of birth, and not the title of the appellant generally as heir; and that the Courts have not considered or adjudicated upon either the law or the facts as respects the appellant's right to succeed independently of the alleged marriage or of his own legitimacy.

It is true that the pleadings in this case are unusually—even for cases from the Mofussil Courts—loose and imperfect, and no distinct issues have been framed between the parties under the Regulations for that purpose; indeed, to the original suits of 1835 and 1836, the appellant appears to have become a party only by an order made after their commencement; and though we are disposed to think that the appellant's claims were distinctly before the Zillah Court in 1839, yet it must be admitted that neither the Principal Sudder Ameen nor the Judges of the Sudder Court appear to have thought it necessary to adjudicate upon them. Still, however, the question for decision is one of Hindoo Law, involving, in no inconsiderable degree, what is matter of history, and we do not think that it would be right for us to send back the case for the purpose of the Courts in India considering such a question; we are the less inclined, too, to adopt such a course, because the particular enquiries directed by the Sudder order of 1839, as to the marriage of the

appellant's father and mother, and as to his own marriage, appear to us to have involved every element on which the appellant's right to inherit could depend, and the appellant, therefore, had every opportunity of adducing evidence to establish his claim.

The only remaining question is the reversal by the Sudder Court of that part of the judgment of the Zillah Court which directed that an annual sum of 6,000 rupees should be set aside out of the estate, given by the decree to the respondent, for the maintenance of the appellant. The grounds upon which the Sudder Court reversed this part of the judgment do not appear on these proceedings. The right of an illegitimate child of one of the three regenerate classes to maintenance out of the estate of his father, is recognized by all the authorities on Hindoo Law relating to this subject; and as to this, there was no difference of opinion between the Pundit of the Sudder and the Pundits of the Zillah Courts, although they differed on the right to the inheritance. It is not shown that the allowance is in excess of what the appellant is justly entitled to receive with reference to the value of the estate; and on this question, the Native Judge of the Court of the district in which the zemindary is situated, had the best means of forming a correct opinion. If the Court had thought the amount in excess, means might have been taken to ascertain what would be a proper allowance. In this part, therefore, of the judgment of the Sudder, their Lordships are unable to concur; they are of opinion that, although the appellant is shown to have no right to the inheritance, either as the legitimate or the illegitimate son, he is still entitled to maintenance out of the estate of his deceased father.

Their Lordships, therefore, will humbly recommend to Her Majesty to reverse the decision of the Sudder Court, in so far as it reversed the decision of the Sudder Ameen with respect to the maintenance; to declare that the appellant, as the illegitimate son of the late Rajah Umur Purtab Syn, was, and is, entitled to maintenance out of his estate, at the rate fixed by the Sudder Ameen; and to remit the case to India for the purpose of effect being given to that declaration; but in other respects to dismiss this appeal, although without costs, the appeal having, in part, succeeded.

The 8th December 1858.

Present:

Lord Kingsdown, the Judge of the High Court of Admiralty, Lord Justice Knight Bruce, Sir E. Ryan, and Sir L. Peel.

Practice of Privy Council (in reversing decrees of Lower Courts on questions of fact.)

On Appeal from the Sudder Dewanny Adawlut of Agra.

Cheynt Ram,

versus

Chowdhree Nowbut Ram.

A very strong case is required to justify the Privy Council to reverse the decision of two Courts in India upon a mere question of fact as to the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought, particularly when the Judges in the Court below had formed their opinions mainly on an inspection of the document which the Privy Council has had no opportunity of seeing.

THE appellant in this case has undertaken a task of no ordinary difficulty, since he asks for a reversal of the decision of two Courts in India upon a mere question of fact, that fact being the genuineness or forgery of an instrument which is the foundation of the action in which the appeal is brought.

The Judges in the Court below have formed their opinions mainly on an inspection of the document, which we have had no opportunity of seeing. The case

must be very strong to justify such an unusual exercise of authority, and the question is, whether the appellant has established such a case.

Radakishen, the original appellant, and whom we shall call the appellant in the observations we are about to make, brought an action against the respondent on a bond for 16,000 rupees. The name of the respondent appeared in the bond, impressed by the stamp of a seal. The Zillah Court, on examining the signature, and comparing it with other impressions of the seal of the respondent, acknowledged to be genuine, decided that the impression on the bond was a forgery, and dismissed the suit. The Sudder Court, on appeal, confirmed this decision, and, in effect, ordered the appellant to be prosecuted for forgery. He was so prosecuted, and was acquitted. He then applied for a review of the judgment against him in the Civil suit, which was refused, and he has now appealed to Her Majesty in Council.

The appellant and respondent were both residents at Bareilly, the former being apparently a banker and money lender, and the latter a land-owner. It is admitted on all hands that pecuniary transactions had taken place between these parties; that moneys were advanced by the appellant to the respondent, and securities given by the respondent to the appellant. In particular, a mortgage by the respondent to the appellant, under which the latter was in possession of a village of the respondent, and a bond for 4,000 rupees by the respondent to the appellant, are specifically mentioned.

But in addition to these transactions, the appellant alleges that there were many other advances made by him to the respondent upon bonds and notes-of-hand, in respect of which, in the month of August 1851, a large sum was due for principal and interest; that in the course of that month the parties came to a settlement of accounts; that the appellant having consented to make an abatement from the amount due, the balance was settled at 15,000 rupees; and on the 30th of August of 1851, a bond was executed by the respondent to the appellant to secure the payment of that sum, with interest at one per cent. per month, in the month of May then following.

The amount due upon the instrument being unpaid, the appellant on the 30th September 1852 filed his plaint in the Zillah Court of Bareilly, claiming the sum of 16,955 rupees for principal and interest on the alleged bond.

On the 2nd October 1852, the defendant undertook to file a defence to the suit within two weeks.

This, however, he neglected to do; and on the 2nd December 1852, an order was made by the Court that the plaintiff should proceed to prove his case *ex parte*.

He accordingly, on the 3rd December 1852, obtained an order to summon his witnesses, and brought into Court the bond in question, which was ordered by the Judges on that day to be kept with the *misl* or record of the proceedings.

The production of this bond, and its deposit in Court at this early stage of the proceedings, when it was open to the inspection of the respondent and his agents, appear to be of great importance in this case.

The bond purported to have been given after a settlement of accounts, to be stamped with the seal of the respondent, and to be witnessed by Doorgapershad, the *mootsuddae* or man of business of the respondent, who is also described as the writer of it, and it was dated only thirteen months before the suit was instituted. The respondent was resident on the spot where the bond was executed, and where the suit was brought, and both he and his agent must have known with absolute certainty whether the one had written and the other had sealed such an instrument, or whether the document was a mere forgery.

The respondent had notice of this claim on the 2nd of October 1852. It is difficult to suppose that, if he had never executed any such instrument, he should not instantly have protested against the forgery; but he took no step whatever to defend the suit on this ground, or on any other, till the case was ordered to proceed *ex parte*. He then, on the 9th of December 1852, applied to be admitted to defend

the suit not on the ground that the bond was a forgery, but on the allegation "that he has several objections to the plaintiff's claim, which involves a considerable sum of money."

He was let in to defend; and, on the 6th of January 1853, he put in his answer.

In this answer he states that the plaintiff's claim is based on a fictitious bond, and he assigns various reasons to show that the fact of his having given such a bond is improbable, but he nowhere distinctly says, "I never executed any such bond. The seal is not my seal; it differs from the genuine impression of my seal: the writing is not the writing of my agent." Amongst other circumstances of improbability on which he insists against the plaintiff, he urges that it is very unlikely that the exact balance of accounts should result in a sum of 15,000 rupees, without any fractional sum, and that a bond for so large a sum should not have been registered, more especially as the bond for 4,000 rupees was registered.

On the 12th February 1853, the appellant filed his replication. With reference to the two objections referred to, he states that, as to the amount of the bond, the sum really found due on the settlement of accounts, for principal and interest, was rupees 17,389-1-3; but that the appellant, on the importunate entreaties of the respondent, consented to give up the surplus beyond 15,000 rupees, and to take a bond for that amount; and he says that the accounts and documents, showing the exact balance which were cancelled on the execution of the bond, still exist to remove the defendant's objection. With respect to the want of registration, he states that he was in the habit of advancing thousands of rupees to the defendant upon unregistered documents.

The rejoinder of the defendant was filed on the 23rd March 1853, in which, amongst other things, he alleges that, if the former documents had ever any existence and were cancelled, they ought to have been given up to him, the defendant, on the execution of the bond, and that "when the former documents are produced, the imposture of the claim will be fully exposed."

In this state of the record the parties went into evidence.

The evidence of the plaintiff in the suit may be conveniently considered under three heads:—

- 1st. The transactions leading up to the bond:
- 2nd. The execution of the bond; and
- 3rd. The subsequent recognition of it by the defendant.

The Clerk of the plaintiff, named Laljeemul, gives the following account under the first head:

"The facts are these: there were mutual dealings betwixt Chowdhree Nowbut Ram and Lalla Radhakishen. Radhakishen demanded payment from Chowdhree Nowbut Ram. Chowdhree Nowbut Ram sent to Radhakishen his *mootsuddee* (Persian scribe) Doorgapershad to compile accounts, and find the balance due by him. Doorgapershad Mootsuddee then came to Radhakishen and computed accounts, on which a balance of rupees 17,893-1-3 appeared against Nowbut Ram. Doorgapershad returned to Nowbut Ram with the list of accounts, leaving one copy of it with Radhakishen, and telling him to have the accounts examined, and that he would himself do the same. Radhakishen then gave me the list of accounts and told me to go to the firm of Lalla Muthar Doss, and to have the accounts examined by Lalla Doorgapershad, his agent. I accordingly went to Doorgapershad, agent, with the accounts, and showed it to him, and told him to see if there was any discrepancy in it, Doorgapershad and Kishen Chund, the principal agent of the firm, looked at the account and said there was no discrepancy in it. I brought the account back to Lalla Radhakishen, and told him it was correct. On the same day Doorgapershad Mootsuddee, accompanied by Sheonarain, the brother-in-law (sister's husband) of Chowdhree Nowbut Ram, came again to Lalla Radhakishen, and said that Chowdhree Nowbut Ram had seen the account and understood it, but he desired that some reduction should be made in the interest. On this Lalla Radhakishen said, 'Pay me my money, and I shall make any reduction you will propose in the interest.' On this Sheonarain and Doorgapershad Mootsuddee said, 'The money is ready, and we promise to pay in the month of Jyet.' Radhakishen then asked what reduction he should make; and Doorgapershad Mootsuddee, and Sheonarain the brother-in-law of Nowbut Ram, said, 'You may have a bond for 15,000 rupees and relinquish the balance in our favor.' Radhakishen agreed, and said, 'Very well, pay 15,000 rupees in Jyet.' Then they returned to the Chowdhree and must have told them everything."

He then says, on cross-examination, that of the balance, actually due, 10,200 and odd rupees were for principal, and the remainder for interest: that interest was charged at 1 per cent per month, and that there were six bonds and notes of hand.

This witness refers to an examination of these accounts by the gomashtha or head clerk, at Bareilly, of the firm of Muthra Doss, one of the largest banking firms in India.

This gentleman appears to be above all suspicion; he is examined on behalf of the plaintiff, and he entirely confirms the account of Laljeemul. He says:

"It is something less than two years when Laljeemul, Mootsuddee of Lalla Radhakishen, brought me Chowdhree Nowbut Ram's account, in order to have the computation of interest examined by me, and I and Kishen Chund accordingly examined it; subsequently, eight or ten days after, I heard that Lalla Radhakishen had relinquished 2,000 and odd rupees, and that he caused Chowdhree Nowbut Ram to execute a bond for 15,000 rupees."

He then says there were many previous dealings between the appellant and respondent; that whenever the Chowdhree wanted money, no one but the appellant supplied him with it; that dealings had been carried on from the time of Chowdhree Bussunt Ram, who was the father of the respondent.

The statement of these witnesses, as to the settlement which took place, and the abatement which was made by the appellant, is confirmed by the evidence of Ramsookh and of Golam Hossein, who concur with Laljeemul in representing that Sheonarain, the brother-in-law of the respondent, was one of the persons at whose instance the abatement was made.

That extensive dealings took place between the appellant and respondent, is further proved by the evidence of Seetaram, a tehseeldar, or who had filled that office, which we understood is one of respectability, who says that "dealings existed from the time of respondent's father, and that, whenever they wanted money, they borrowed it from the appellant; and that very often money was drawn on notes of hand without the execution of a bond."

In addition to this evidence the appellant produced the bonds and notes upon which the balance was alleged to have been found due, and the account said to have been made out, showing the balance.

The respondent had alleged that, when these documents were produced, the imposture, as he calls it, would appear. They are produced, and no attempt whatever is made to discredit them.

It is difficult to imagine proof more distinct and positive upon the first point—the transactions which led up to the bond. But the appellant's evidence distinctly names two persons, connections of the respondent—one his agent, the other his brother-in-law—by whose intervention this arrangement is alleged to have been made. The respondent does not examine either of these witnesses, or offer in any other manner whatever to contradict the testimony of the appellant's witnesses.

That the balance was ascertained—that the abatement was made—that there was an agreement to give a bond for 15,000 rupees—are facts which must be considered as conclusively established.

Secondly, as to the execution of the bond. Laljeemul, after the passage which we have read from his evidence, proceeds thus:—

"Again the next day, four ghurries after sunrise (two ghurries and a half make one hour), Doorgapershad Mootsuddee came to Radhakishen, and said, 'Send your witnesses that the bond may be recorded.' Lalla Radhakishen then sent myself (Laljeemul), Choteyloll, Ramsookh, Sheikh Ameeroollah, and Gholam Hossein, with Doorgapershad, and told us, 'if the Chowdhree should record a bond, and acknowledge it before you, you should witness it.' All five of us accordingly went in the *dewankhanah* (a hall for receiving visitors) of Chowdhree Nowbut Ram, accompanied by Doorgapershad. The Chowdhree was seated there. Doorgapershad told him that Lalla Radhakishen had sent us to witness the bond. The Chowdhree told Doorgapershad to bring out paper and to record the bond. On this, Doorgapershad brought out paper, and engrossed a bond thereon. He gave the bond to the Chowdhree, who saw it; and having sent for his box, impressed it with his seal, and told us to witness it. Doorgapershad Mootsuddee

(the writer), and Ramsookh, Choteyloll, myself, Sheikh Amceroollah, and Gholam Hossein accordingly witnessed the bond. The bond was recorded in our presence.' ”

His account is confirmed by Choteylall, a friend of the respondent, another attesting witness ; by Ramsookh, also an attesting witness (though his name is written by Doorgapershad, the agent of the respondent, as Ram Sing) ; and by Gholam Hossein, who was present, and saw the transaction, though there appears to be some error as to his being an attesting witness—at least, his name is not found in the instrument as printed in the appendix.

These witnesses are cross-examined, but their evidence is not in the least shaken, and, if it be believed, it proved most distinctly that the instrument in question was written by Doorgapershad, the agent of the respondent, who also attested it, and that the respondent deliberately stamped his seal upon it, in order to give it effect.

But what makes his evidence conclusive is this : that the respondent having the means of disproving the story if untrue, by producing his own agent to say that he did not write, and did not witness the bond, does not venture to call him, or any other witness, to the point. He examines thirteen witnesses upon matters totally irrelevant to the real issue, and does not examine one who tends even to throw a doubt upon one single material fact of the appellant's case.

But the matter does not end here. So far from denying this bond, the respondent, after its execution, endeavoured to obtain time for payment of it, which brings us to the third head of evidence—the recognition. Doorgapershad Moot-suddee is asked : “ Did any one, ever coming before you, make any acknowledgment ? ” He answers :—

“ In the last month of Kartick, I went to Chowdhree Nowbut Ram, to write a note on account of Lalla Kalka Doss, resident of Peelhibest, who had mortgaged the village of Roop-poor. Chowdhree Nowbut Ram told me to give Lalla Radhakishen 4,000 rupees, for which the latter had brought an action ; further saying, ‘ There is another suit for 15,000 rupees. You may give 4,000 rupees, and Lalla Radhakishen will take something less in the amount of costs ; you should have this matter settled, and the suit for 15,000 rupees you may have adjusted afterwards.’ I said that the matter, as it then stood, would cause disrepute, and that it should, therefore, be settled. Again, Chowdhree Nowbut Ram said, ‘ You should have the matter settled.’ I said, ‘ Tell me what to say, that I may go to him and settle accordingly.’ Chowdhree Nowbut Ram replied, ‘ that he would be able to pay the money in five years, and that if he were made to pay in a lump it would ruin him.’ I said, ‘ Your and Lalla Radhakishen's affairs are founded on mutual friendship. He is like your patron, and will not ruin you ; but he will not agree to the promise of payment in such length of time, because, in six years' time, interest on the sum of 15,000 rupees will accrue to nearly 15,000 rupees. Such promise of payment, without interest, he will not agree to.’ Again the Chowdhree said, ‘ You may give 4,000 rupees on account of the suit for that sum, I shall send Sheonarain, and, as you also will be there, you may have the matter settled ; and, if he will not come to terms, I will defend the suits.’ After this I came and told Lalla Radhakishen what the Chowdhree had said ; and also that, as the transaction was like a family affair, he should settle it amicably ; adding, ‘ It is difficult for him (the Chowdhree) to pay 15,000 rupees at once. It is advisable to agree to instalment payment.’ Radhakishen said, ‘ I have no objection : but how can I agree to receive instalments without any one's coming to propose it ? Have instalments ever been agreed to without interest ? ’ ”

This attempt of the respondent to obtain time for payment of the bond is further proved by Seetaram, the witness already mentioned, who, speaking of Sheodut Ram, Jumadar, whom he describes as the Dewan of the respondent, and sole manager and agent of his household, says :—

“ Sheodut Ram Jumadar told me that ‘ Lalla Radhakishen had brought an action for 15,000 rupees against the Chowdhree ; you should persuade the latter to fix an instalment of 3,000 rupees per annum for five years without interest. You visit Lalla Radhakishen frequently, and should, therefore, have this matter settled.’ I and the Jumadar accordingly went to Radhakishen and introduced a negotiation relative to the payment by instalments. Lalla Radhakishen said, ‘ I will not agree to receive instalments for five years without interest.’ ”

There was, therefore, clear, positive, consistent, uncontradicted testimony of the agreement to give the bond, of its actual execution, and of its subsequent recognition ; and, in the teeth of all this testimony, upon what grounds have the Courts below held it to be a forgery ?

They compared the impression made by the seal on this instrument, with the impression made upon other instruments by what is admitted to have been a genuine seal of the respondent, and they say that, upon a very minute inspection and measurement by a pair of compasses, the letters, or some of the letters, of the defendant's name appear on the bond to differ something in their size from the signatures admitted to be genuine. Whether this may have arisen from the mode in which the stamp was affixed on the different instrument, or from the greater or less quantity, or the greater or less fluidity, of the ink used on such occasions, it is immaterial to enquire. The question is, is it or not proved, beyond all shadow of doubt, that the respondent did affix some seal to this instrument for the purpose of giving it effect? The evidence on this point is quite irresistible.

It is not till the case is on hearing that this objection is made. It never occurred to the respondent or his agents to set up such a defence when the bond was deposited in December 1852, nor, as far as appears, till July or August 1853. The bond had been lying in the interval in the office of the Court; it is to be collected from the Circular Order referred to in the argument, that it is not difficult and not unusual for parties to procure access to, and to tamper with documents so placed, and we cannot have the least doubt that such discrepancy as exists between this seal and the others produced, if they were the impressions of the same stamp, and if the difference is not to be accounted for by the accidental circumstances to which we have adverted, has been occasioned by the fraudulent acts of the respondent's agents while the bond was in the custody of the Court.

When the direct evidence in favor of the instrument is so overwhelming, it is needless to resort to confirmatory proof; it may however, be observed that it is shown that the stamp on the instrument had been sold, shortly before the date of the bond, to an agent of the respondent for his use; and if the bond had been a forgery, it is utterly inconceivable that of all persons in the world the name of the respondent's own confidential agent should have been selected for forgery, as the writer of it and one of the attesting witnesses.

Every circumstance of suspicion which could be alleged against the appellant's claim was brought forward, and urged with great force and ability by Mr. Forsyth, but there really is none of any value.

The only observations which at first had some weight with their Lordships were three—*first*, that the bond was not registered; *secondly*, that the cancelled documents were not delivered up; and *thirdly*, that it was strange that a suit should have been instituted (as it was) upon the later bond for 4,000 rupees, instead of the two being united in one suit, or that which was first executed (the bond for 15,000 rupees) being first put in suit.

But as to the *first* point, we are informed by Sir L. Peel that in India two-thirds of the bonds which are payable at short dates, as this was, are not registered; as to the *second*, that a plaintiff is required to prove the consideration for his bond, and that the documents relating to it were, therefore, properly left in the possession of the appellant; and as to the *third*, supposing the two bonds could by the practice be included in one suit, we think that the delay in bringing the second suit is sufficiently accounted for by the negotiations which were carried on for payment of the amount of the bond by instalments.

Upon the whole, we can entertain no doubt that there has been in this case an entire miscarriage of justice in the Courts below; and we cannot but express our deep regret that the appellant should not only have had his suit dismissed, but been subjected to the indignity, vexation, and expense of a criminal prosecution in a case where the claim is established by testimony less liable to suspicion than we ever remember to have seen brought forward on an appeal from India in a case of disputed fact.

We must do to this gentleman, or to his representatives, such justice as is in our power, by advising Her Majesty to reverse the decision complained of, to estab-

lish the plaintiff's demand in the suit, and to order payment of the amount of the bond with the interest due upon it by the respondent, together with the costs both in the Zillah and in the Sudder Dewanny Courts, and the costs of this appeal.

The 12th February 1859.

Present :

The Judge of the High Court of Admiralty, Lord Justice Knight Bruce, Sir E. Ryan, Sir J. T. Coleridge, and Sir L. Peel.

Resumption of Invalid Lakheraj—Intervention by Zemindar—Interlocutory orders (Appeal from, not compulsory)—Decree of Special Commissioners (Finality of),—Review of Judgment—Fouzdary Court (Jurisdiction of).

On Appeal from the Special Commissioners of Revenue in Bengal.

Maharajah Moheshur Singh,

versus

The Government of India.

In a suit by Government under Regulation II. 1819, to resume invalid lakeraj land held by a Mohunt, as the interests of the zemindar who claimed a portion of the lands sought to be assessed, as forming part of his permanently assessed estate, were liable to be affected by the decision of the Collector.—**Held** that he had right to intervene, and become a party to the suit, and to prefer an appeal from the decree.

There is no law which requires a suitor to appeal from interlocutory orders under penalty of forfeiting for ever the benefit of the consideration of the Appellate Court. The Privy Council have, in many cases, corrected erroneous interlocutory orders on the appeal of the whole cause coming before them.

The decree of the Special Commissioners under Regulation III. 1821 is final, if no appeal or petition of review is presented within a reasonably sufficient period.

The object of a review being a re-consideration of the same subject (except in case of death or for some other unavoidable cause) by the same Judge as contra-distinguished to an appeal, expedition in presenting a petition for review is indispensable with a view to the hearing of the review before the original Judge.

The Regulations relative to the granting of a review by the Sudder Court are applicable to the granting of a review by the Special Commissioners.

The causes accounting for delay in applying for, and intended to justify the grant of, a review, must be of grave importance.

A reference to certain proceedings had in the Fouzdary Court, is no reason for a review, for the jurisdiction of that Court is confined to cases of possession, and it is beyond its province to enquire into and ascertain titles to landed property.

IN the course of the discussion upon this case, two questions have been raised which, it appears to their Lordships, are ripe for decision.

The first question is, whether the Revenue Commissioners, who originally exercised jurisdiction upon the present occasion, were, with respect to the appellant, entitled so to do; it being contended on the part of the respondent, that the present appellant was never properly a party to the suit.

The next question is, whether the review which was granted in this cause, was granted in due conformity with the existing Regulations.

In order to render our judgment clear on these two questions, it is necessary to make a brief statement of the facts out of which they arise.

The original proceedings in this cause commenced in the office of the Deputy Collector of the district. It appears that there is in the province of Behar a pergunnah named Dhurumpore, *containing three zillahs*: but the present suit relates to one only, called Beernugger. This pergunnah was held in perpetuity by the Zemindar for the time being, and his successors, on payment of a revenue to the Government, fixed by a permanent assessment under the decennial and permanent settlement. By this settlement, the Zemindar and his successors were exempted from all payment in the nature of land-tax; save the amount stipulated by the Umuldustick granted to the first grantee.

One of the few exceptions to which such settlements are subject was insisted on by the Government in this case as applicable to some lands within the limits of

the Zemindary, *viz.*, the tenure of them as lakheraj under an illegal or invalid title. It is an admitted fact that there were certain lands claimed as lakheraj within their pergunnah. Those which became the subject of dispute in this cause, were owned by a Mahant, as the head of, and for the benefit of, a community of religious devotees. The lands had, in fact, been enjoyed by them for a long time, free from assessment; and between this society, as represented by their head, the Mahant, and the Government, the dispute arose as to the assessable quality of the lands. The Mahant had of course an interest to enlarge the boundaries of his lands, and unless the contiguous proprietor admitted the boundaries as claimed by the Mahant, his presence as a party to the suit would seem to be conducive to the correct adjustment of so delicate and important a question, a course to be encouraged with a view to diminish subsequent litigation.

In this state of things, Mr. Henry Beresford, the Deputy Collector, on the 3rd October 1836, commenced the present proceedings, by a notice to two persons, Kerperam and Bhugwan Dass; the first being one of the original grantees, and the second the Mahant supposed to be in possession, Bhugwan Dass was called upon to show his title, and to prove by what authority he held the lands free from payment of revenue.

It is to be observed that these proceedings do not state, by any description whatever, the extent of lands to which this notice applied.

At some of the meetings it appears that the Mooktar of the Zemindar had accidentally, or otherwise, been present, and had been questioned by Mr. Beresford, the Deputy Collector. Under these circumstances, the Zemindar, apprehending that his interests might be effected by any decision of the Collector, declaring the lakheraj lands to be more extensive than they really were, intervened by petition; and it appears to us that, in every view of the case, he had an interest which justified him in so doing: for even assuming it to be true that the Collector's report, as to the extent of the land subject to revenue was not binding on the Zemindar, and that he had a remedy against such a proceeding in another Court, still he had clearly an interest in averting an erroneous report being made to his prejudice, the creation of *prima facie* evidence prejudicial to himself, and the necessity of resorting to the Civil Courts to remedy an evil already inflicted.

And this view of the case seems to have been taken by all parties and by all Judges who were cognizant of the cause; throughout the whole of these proceedings no objection was ever raised to his intervention; he was allowed the privileges of a party by the examination of his witnesses, and otherwise; and he was subjected to all the inconveniences of a suitor by the condemnation in costs in virtue of the ultimate decree.

Looking at all that passed, and considering that in every possible point of view the Zemindar had an interest to protect before the Collector, we think it quite vain to contend that he was not both *de-facto* and *de-jure* a party to this cause, or that he had not a sufficient interest to justify him in assuming that character, or that the Collector and Commissioners were in error in so receiving him; therefore, we think that the plea to the jurisdiction has entirely failed on that ground.

We will now follow the course of these proceedings so far as it is necessary for our present purposes. Mr. Henry Beresford having made an investigation, which to him appeared to be satisfactory, having previously prohibited the Zemindar from collecting the rents from the disputed lands on the 28th January 1838, gave his decision, and by that decision, 14,816 beegahs of land were subject to assessment: the Zemindar appealed to the Appellate Court, namely to the Special Commissioner of Revenue, under Regulation III of 1828. On the 6th December 1841, Mr. Moore pronounced judgment to the effect that, 3,513 beegahs alone were assessable, and that the collections made by Government on other land should be restored to the possessors: on the 8th March 1842, this judgment was confirmed by Mr. Doyly, another Special Commissioner. On 21st September 1847 a petition

for a review on behalf of the Government was presented to Mr. Edward Currie, another Special Commissioner, which petition of review was granted. A hearing took place accordingly. Mr. Currie reversed the judgment of March 8th, 1842, by an order bearing date 24th April 1858, which was confirmed by Mr. Jackson in June 1848.

Although the question which we have now to determine is distinct from that of the merits of the case, yet it is one of very grave importance, as it respects the rules to which the Special Commissioners are to be subject in reviewing a decision which has been made in a resumption suit. We proceed to consider whether the review was granted in conformity with the Regulations existing at that time with respect to the granting a review.

Before we enter into the particulars of that question, we deem it right to notice an objection which was taken at the bar on the part of the respondents, that it was too late now to impugn the regularity of the proceeding to grant the review; that, if the appellant deemed himself aggrieved by it, he ought to have appealed at the time, and that he was too late in doing so after a decision had been pronounced against him.

We are of opinion that this objection cannot be sustained. We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication.

Before considering whether this review was granted in conformity with the Regulations, let us look a little to the principles upon which we think lapse of time is a most important consideration. In the present case, five years and a half had passed away since the original decision. Surely, whatever may be the true import of the Regulations, the parties interested in the decision which had been made were entitled, after the lapse of a sufficient period, no appeal having been asserted or petition for a review presented, to conclude that the Government acquiesced in what had been done by the Special Commissioners, and in that rational conviction, to deal with the property upon the footing of the past decision.

Now, what are the evident consequences of delay, unless justified by particular circumstances? Those consequences are, that all the arrangements between man and man, concluded without any reason to suppose they were impeachable, may be set aside and thrown into confusion; producing at one time, severe hardship to the proprietor, at another equal evil consequences to those who dealt with him; thus all such arrangements and transactions, which are the very life and soul of property, and which it is equally the interest of the Government to support and encourage, may be disturbed to the detriment of all concerned. We think, for these reasons, that it must have been the wish and intention, as well as the interest of Government, so to frame its Regulations that these principles should be carried into effect, and that after a decision was past, unquestioned by appeal, its finality should be left in doubt no longer than the requisites of justice imperatively demanded.

Let us now address our attention to the Regulations which have passed relative to the question of granting a review. It must be borne in mind that a review is perfectly distinct from an appeal; that it is quite clear, from all these

Regulations that the primary intention of granting a review was a re-consideration of the same subject by the same Judge, as contra-distinguished to an appeal which is a hearing before another tribunal. We do not say that there might not be cases in which a review might take place before another and a different Judge ; because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it ; but we do say that such exceptions are allowable on *ex necessitate*. We do say that in all practicable cases the same Judge ought to review ; and that for the attainment of that object, expedition in presenting a petition for the review is indispensable, and the only practicable course for attaining that end is by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge. Looking at all these circumstances, we should naturally expect to meet in the Regulations upon this subject such provisions as would prevent the evils necessarily incidental to delay and procrastination.

It may be well to observe that the Regulations respecting the resumption of lands, and the subjecting them to be assessed, are Regulations in themselves almost necessarily severe in their operation ; and while we give to them the force and effect which we are bound to do, as the subsisting law upon this subject, we cannot, and ought not, to forget that though it is manifestly, at first sight, the interest and duty of Government to bring under taxation as large an extent of land as possible, yet that it is equally the interest and the duty of Government to protect the rights of property ; for if such rights be not protected, there can be no security for the prosperity of any country. For these reasons we must deem it to be our duty, in interpreting and carrying into effect these Regulations, to give full force and effect to those provisions which were manifestly intended to protect the rights of property, and prevent a vexatious interference with those rights.

By Regulation III of 1828, Section 4, Clause 5, it is enacted that the rules prescribed by the existing Regulations, regarding a review of judgment by the Civil Courts, are to be held applicable to proceedings by the Special Commissioners in revenue cases ; those rules are to be found in Regulation XXVI of 1814, and in the 4th Section. There has been much discussion at the Bar, as to whether the provisions contained in the 2nd Clause of this Section are applicable to the present case, or whether it falls within the operation of the 3rd Clause. The 2nd Clause directs that the petition for review shall be presented within three calendar months ; this provision, however, admits of an exception, provided that the parties preferring the same shall be able to show just and reasonable cause for not having preferred such application within the limited period. It has been contended that, if the Court—that is, the Special Commissioner, in this case—is satisfied, no further enquiry can take place. But we think it clear that this argument cannot be sustained, for in the same Clause the Courts are required to state at large their reasons for admitting such applications after the limited period : if they refuse the review, the decision of the Court below is final ; if they admit it, it must be reported to the Sudder, and the Sudder may grant it if they think fit. It is manifestly clear, therefore, by the provisions of these two Clauses—1st. That to admit applications is not to grant a review ; and, 2ndly. That all that they may do is examinable by the Sudder.

We are, however, of opinion, that the 2nd and 3rd Clauses of this Section must be read together, and that such of the substantial enactments of both as are in their nature applicable to the Court of the Special Commissioner, regard being had to its independence of the Court of Sudder Dewanny Adawlut, must be held to have been applied to it by the Regulation III of 1828, Section 4, Clause 5. We do not apprehend that a decree passed by a Special Commissioner is to be subject in all respects to the rules applicable to a decree by a zillah, city, or provincial Court, and we think so, because the proceedings of the Special Commissioners are subject to the cognizance of the Sudder ; whereas by the provisions of this Regulation, any

orders of the Courts specified, granting a review, must receive confirmation from the Court of Sudder Adawlut.

The construction which the Court of the Sudder Dewanny Adawlut has put on these Regulations, by framing its own procedure on reviews, by the provisions of the 2nd and 3rd Sections viewed together, is also the construction which their Lordships think applicable to reviews of the judgments of the Special Commissioners.

Whenever, therefore, a petition for a review of any judgment of the Sudder is presented after three months, it is indispensable that the party preferring such petition should, in the first instance, account for the delay.

The delay being satisfactorily accounted for, the review is to be granted, if, upon a consideration of the reasons stated, the circumstances of the case shall appear in justice to require it. We think that the true construction of this Clause, is a consideration of the reasons stated in the petition presented for a review, and not of other reasons which might be suggested, but not to be found in the petition.

To manifest the great care which the Government of India provided as a guard against improperly granting a review of a judgment, the Sudder Court is required to record on their proceedings the grounds upon which the review is granted.

We are of opinion that all these Regulations applicable to the granting of a review by the Sudder Court of its decrees, are applicable to the proceedings of the Special Commissioner, in granting a review of their own decrees.

We have, therefore, in this case to consider two things : *first*, whether just and reasonable cause has been shown for the delay in presenting the petition for review ; and *secondly*, whether the circumstances of the case, in justice, required it should be granted.

In order to prosecute our enquiry into these questions, we must look to the petition for the review of the decree of Mr. Moore and Mr. Doyly presented on behalf of the Government on the 21st of September 1847.

We are unable, from a perusal of that document, to discover any satisfactory reason for the delay which has occurred ; indeed there is not to be found in this petition any attempt to state any reason why, looking to all the facts and circumstances as they existed at the time of the judgment of Mr. Moore and Mr. Doyly, the petition might not have been presented within the three months.

But true it is that circumstances might have come to the knowledge of the Government afterwards which may at once justify the delay, and also the granting a review, because, giving a liberal construction to the Regulations of 1814, there might be cases in which fresh evidence would be admissible.

We are, however, of opinion that, for granting a review in the cases we have just supposed to exist, the causes accounting for the delay, and intended to justify the grant of a review, ought to be of grave importance.

Indeed it is quite manifest that this must be so, or the litigation might be indefinitely suspended, and all the evils incidental to the uncertainty of the rights of property incurred.

Let us look again to the petition for review. The first statement is simply a denial of the correctness of the past decision.

The first reason assigned is that, on the 25th of August 1842, Mr. Elliott and Mr. Doyly came to a contrary conclusion on similar premises. Assuming the fact to be so, and, for the moment, that it was good cause for asking for a review, it is manifest that such cause arose five years before the petition was presented, and there is not the slightest attempt to account for this delay.

And, further, we are of opinion that in a case of this description, the fact of two Commissioners coming to conclusion not altogether reconcileable with the prior decree of Special Commissioners, is not a sufficient ground after the expiration of so many years, for the granting a review.

The only other reasons to be extracted from this petition for a review are an impeachment of the grounds of the judgment of the 8th of March 1842, with which

the parties must have been cognisant at the time, and therefore would be no excuse for delay, and a reference to certain proceedings had in the Foujdaree Court. We are somewhat surprised that this last circumstance should have been introduced as a reason for a review; for we apprehend the jurisdiction of that Court is confined to cases of possession, and that it is beyond their province to enquire into, and ascertain the titles to landed property.

We derive no light from the decision of the Commissioner allowing this review—no further reason is assigned. Upon a consideration of all these proceedings, we have come to the conclusion that, in granting this review, the reasons assigned are wholly insufficient; that the requisites of the Regulation have not been complied with; that no just and reasonable cause has been shown for the delay in presenting the petition; and that that petition does not state any circumstances which, in justice, require the granting the review. It necessarily follows that, if the review was granted without due regard to the Regulations governing such proceedings, it, and all that has been done under it, must fall to the ground. We shall, therefore, humbly advise Her Majesty to reverse the Decree of the 8th of June 1848, and to affirm the Decree of the 8th of March 1842, and, further, as imperatively required by justice, to condemn the Government in all the costs incurred both in the Courts below and upon the appeal, incurred in all the proceedings since the 8th of March 1842.

We believe that a Decree of this tenor will be in strict conformity with the Regulations which have the force of law in India, and, at the same time, may contribute to insure a just confidence that these special jurisdictions, which in some degree displace the ordinary tribunals of the country, will carefully observe those rules which have been prescribed to regulate their proceedings,—rules which have been wisely introduced to guard against the possible abuse of authority, and a departure from which would be likely to produce distrust, and to defeat the principal objects of their institution.

The 18th March 1859.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, the Judge of the Court of Probate, and Sir L. Peel.

Recovery of debt upon alleged Agreement—Evidence.

On appeal from the Sudder Dewanny Adawlut of Madras.

Katchy Kullyan Rungappa Kalaka Thola Oodiari, Zemindar of Oodiarpalliam,
versus

Baloosamy Chetty.

Suit for the recovery of a debt upon agreement which was not brought forward or alleged to be in existence, when the same demand was successfully disputed in a former suit brought during the infancy of the predecessor of the present appellant, who was the son of the alleged original debtor. The respondent having failed to account satisfactorily for the non-production of the agreement before, and the probabilities of the case being against the genuineness of the agreement, the suit was dismissed.

THIS was an appeal from a decree of the Sudder Dewanny Adawlut at Madras reversing a judgment pronounced by the Zillah Judge of Trichinopoly, before whom proceedings by plaint had been instituted for the purpose of recovering against the present appellant an alleged debt stated to be due from his father. The Judge of the Zillah Court of Trichinopoly, not being satisfied with the evidence, pronounced against the demand. The Court of Sudder Dewanny having taken a different view of the evidence, came to a different conclusion, and this appeal is the consequence.

The original plaint was filed in the early part of the year 1847, and proceeded upon a bond of old date, given, or alleged to have been given, by the father of the defendant, the appellant here; and inasmuch as the suit would have been barred by length of time, unless something had taken place subsequent to the bond, the

suit also proceeded upon an agreement of a later date, which would bring the demand within time.

The agreement is set out in page 7 of the Appendix in these words :—

"Agreement executed on the 30th tie of Jaya (10th February 1835), by Katchy Rungappa Kalaka Thola Oodiar, zemindar of Oodiarpalliam, to Balooamy Chetty, son of Kitchy Chetty, of Cambaconum. Whereas 2,000 rupees, due under a bond executed to your father on the 22nd annee of Vyaya (July 4th, 1826), and 250 pagodas, due under a sunnud issued on the 22nd perattasee of the said year, directing the said sum of 250 pagodas to be paid out of the produce of the village of Anandavady has not been paid up to this date : I do hereby promise to pay you the sum of 2,875 rupees, with interest amounting to 2,875 rupees, making in all 5,750 rupees, before the 30th tie of Velumbee (10th February 1839). Should I fail to pay you the said sum of 5,750 rupees within the time above specified, I further promise to pay you the said sum, with interest at 12 per cent. per annum from this date. As stamped paper cannot be procured just now, this agreement has been executed on this paper. Thus do I execute this agreement with my free will and consent.

"The writer hereof is Mahalingien."

This instrument purports to be signed by Katchy Rungappa Kalaka Thola Oodiar, the zemindar, and there are, or purport to be, four attesting witnesses.

The Zillah Judge was of opinion that this was not shown to be a genuine document ; and, having come to that conclusion, the inevitable consequence was the dismissal of the suit. On appeal, the Court of Sudder Dewanny, as has been said, came to a different conclusion.

Now the attesting witnesses, or alleged attesting witnesses to this document, have been examined, and some other persons who are alleged to have been present ; but, in their Lordships' judgment, they are not persons of a station or position or in circumstances likely to have brought them upon the scene as witnesses on the occasion to which their testimony is applied. That consideration, however, would, in their Lordships' judgment, not of itself have been fatal to the demand, but for some other considerations which present themselves.

It appears that this claim was brought forward during the infancy of the predecessor of the present appellant, who was the son of the original debtor, who was stated to have entered into the bond, and it was brought before the Collector. The matter was debated, and the claim was rejected by the Collector in the year 1841 ; and one of the most remarkable circumstances in the case is, that although the demand was then disputed, and successfully disputed, and as has been said, rejected, the alleged agreement of the 10th February 1835, which, if genuine, cleared the matter from all doubt as to the truth and honesty of the debt, was not brought forward, and was not alleged to be in existence.

Of course it became necessary in the present suit for the respondent, the alleged creditor, when he brought that agreement forward, to state a reason of some kind for not having produced it before ; and his reason was singular enough. He had claimed the debt as one immediately due, but this document of 1835 had extended the time for the payment of the debt, and accordingly it would have appeared that he had instituted the suit at a time at which he could not have sustained it ; and he says that that was his reason for not bringing it forward at that time—a circumstance at once and obviously bearing against the truth and integrity of a person who could so conduct himself.

There is another consideration bearing importantly upon the probabilities of the case. The date of this document is the 10th of February 1835, and it appears plainly from the proofs in the case, that the alleged parties to that agreement were at the moment engaged in warm and hostile litigation at the time, which was not determined until some time after. It is, therefore, manifest that it was in the highest degree improbable that in such a state of things the alleged parties to the agreement would have signed such a document, or entered into such agreement.

There is yet another circumstance to which their Lordships think it not immaterial to allude, *viz.*, that documents are mentioned by the alleged creditor of various kinds, as evidencing the demand, and in effect establishing it, which are never seen, and which were never brought forward.

Now their Lordships certainly, if the matter had come before them originally, as it did before the Zillah Judge, would have come to the same conclusion, *viz.*, that the original demand, which could alone sustain the suit was not proved.

The Judge of the Sudder Dewanny appears to have considered that, if the document had been fabricated, it would have been made more consistent with probability, and not have borne the date or applied to the time which it did ; but it is to be remarked that it was necessary to give it a date anterior to the death of the alleged obligor, the debtor, who died in the month of July 1835, the year in the February of which this document was alleged to be executed. Their Lordships, therefore, must respectfully dissent from that observation made by the learned Judge upon this part of the case, seeing that, if forgery was the intent, the intending forger was in a strait, obliged by the force of circumstances to select a date necessarily carrying with it some degree of credibility.

Their Lordships, therefore, think that in such a state of the evidence in support of the claim, the conclusion of the Zillah Judge, which was only that the demand had not been proved, is shown to have been right. We take the same view, as has already been stated, as the Zillah Judge did ; and considering that their Lordships will humbly recommend to Her Majesty to reverse the judgment immediately appealed from, and that the original plaint should be dismissed, we think that the appellant should have his costs, not only in the Courts of India, but also here.

The 20th June 1859.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir Cresswell Cresswell, and Sir L. Peel.

Madras Civil Service Annuity Fund-Refund of excess subscriptions over half value of annuity.

On Appeal from the Supreme Court at Madras.

The East India Company,

versus

Andrew Robertson and the Trustees of the Madras Civil Service Annuity Fund.

Suit for refund of excess subscriptions to the Madras Civil Service Annuity Fund, beyond the half value of the plaintiff's annuity. HELD that the plaintiff's title to the refund was complete in 1852, and was consequently unaffected by the revised Rules of 1853.

THIS is an appeal by the East India Company from a decree of the Supreme Court of Judicature at Madras, by which the Court declared the respondent, Andrew Robertson, to be entitled to a refund or re-payment of the surplus or excess paid by him to the Madras Civil Service Annuity Fund, as a subscriber to the said Fund, with interest from the 28th April 1855 (the date to which the respondent's account was made up by the Trustees of the fund), to the day of payment, at the rate of 5*l.* per centum per annum ; and the Court decreed the East India Company to pay to the respondent the sum of 44,069 rupees, the amount of such surplus or excess and interest ; and the Court also declared that the East India Company was liable to pay to the respondent an annuity of 1,000*l.* up to the time of his death, and decreed the Company to pay the same accordingly ; and further, decreed the Company to pay the respondent's costs of the suit. There were some further directions in the decree as to acts to be done by the Trustees of the fund, for the purpose

of effectuating the payments decreed to be made by the Company; but it is necessary to refer particularly to those directions, the Company having very properly, upon the hearing of the appeal, taken upon themselves the case of the Trustees.

The Madras Civil Service Annuity Fund had its origin in the year 1800, when it was determined that the objects of an institution, which had been founded in the year 1787 to provide for the widows and children of the Civil Servants of the Madras Presidency, should be extended for the purpose of securing to a certain number of the Civil Servants of the Presidency annuities on which they might retire from the service.

This extension was carried into effect by a Deed Poll, dated the 1st of September 1800. In the year 1814, the funds of the institution, to which the East India Company were large contributors, had greatly accumulated, and it was determined to separate the Charity and Annuity branches of the fund, and to increase the number of annuitants.

A Deed Poll, dated 1st of July 1814, was accordingly executed by a large number of the Civil Servants of the Presidency. The provisions of this deed were to this effect: The accumulated funds of the institution were assigned to trustees, as to five-eighths, in trust for the Charity branch; and as to the remaining three-eighths, in trust for the Annuity branch. There were to be seven trustees of the funds, whom the Chief Secretary and the Accountant-General of the Madras Government were to hold the office *ex officio*, and the others were to be annually elected. The Sub-Treasurer of the Madras Government was to be the Treasurer of the institution, and the moneys belonging to the fund were either to be kept in the public Treasury, or invested in public Government securities; and, as to the Annuity branch, in order to secure the payment of twenty-three annuities of 400*l.* each, a capital of 2½ lacs of star pagodas was to be raised by the three-eighths of the capital belonging to the Fund, and the accumulations upon it, and by the contributions of the East India Company, and the payments of the parties to the deed. Each party was to pay to the Annuity branch 2 per cent per annum on all his salaries, allowances, emoluments, and fees of office, until the 2½ lacs of star pagodas should have been accumulated; but no party was to be required to subscribe towards forming the accumulated capital more than 2,500 pagodas. When the 2½ lacs of star pagodas should have been accumulated, the rate of subscription was to be reduced to such an amount as would provide the annual sum of 8,000 pagodas, being the sum required, with the interest on the accumulated capital, to answer the twenty-three annuities of 400*l.* Each of the annuities was to be payable for the life of the person accepting it. The annuities were to be offered to the Civil Servants, parties to the deed, according to their seniority; but no party was to be allowed to accept an annuity from the Fund until he should have paid to the annuity branch the sum of 2,000 pagodas. The number of the annuities was not to exceed twenty-three, unless the Court of Directors should previously sanction an increased number. Any party accepting an annuity was to resign the Service before the 1st of January next following his acceptance.

Another Deed Poll, dated the 1st May 1818, was afterwards executed by many of the Civil Servants of the Presidency. By this deed, after reciting the Deed Poll of 1814, it was agreed that sixty annuities of 600*l.* sterling should thereafter be granted and paid to the persons who were parties to the recited deed, and to that deed, under the same provisions, however, as were contained in the recited deed as to the annuities of 400*l.*; it was further agreed that none of the parties to the deed should be allowed to accept an annuity of 600*l.* until he should have paid to the Annuity branch of the Fund the sum of 5,490 pagodas, except that a remission or abatement was to be made in favor of certain parties. It was also agreed that the increased monthly contribution to the Annuity branch of the Fund should be paid by each of the parties to the deed so long as he continued to receive salary, allowance, emoluments, or fees of office, notwithstanding he might have subscribed the

whole of the 5,940 pagodas ; and the contribution thereafter to be made by the parties to the Annuity branch was fixed at the rate of $3\frac{1}{2}$ per cent per annum, on all salaries, allowances, emoluments, and fees.

In the year 1824, the East India Company concurred with their Civil Servants in Bengal in the establishment of a Fund for granting them annuities on their retiring from the Service. The principles on which that Fund was to be established, and the rules by which the application of it was to be governed, are contained in a despatch from the Court of Directors to the Government of India, dated the 8th December 1824, and in a paper appended to that despatch, containing the regulations of the Fund as proposed by a Committee of the Bengal Civil Servants, with the alterations in those regulations which the Court of Directors considered to be necessary.

The despatch is to this effect : It notices, in the early part of it, the Annuity Funds at Madras ; and that at Madras the condition of the grant of the annuities was that the grantee should have paid, either in subscriptions to the Fund, a certain aggregate sum, or that he should pay the difference between such sum and the amount of his subscriptions. It then points out, in paragraph 40, that an Annuity Fund to be successful must derive material assistance from the Company ; and then in paragraphs 41, 42, 43, proceeds thus :—

“ 41. A contribution to an Annuity Fund from the Company is evidently a boon to the Service, and operates precisely in the same way as if the Company itself were to grant annuities to Civil Servants upon retirement, so that the real pecuniary advantage to the Service of a Fund so constituted, is that a Civil Servant, when he retires, has, in addition to his own savings, whether they have accumulated in the shape of subscriptions to the Fund, or in any other mode, a life-annuity proportionate to his share of the Company's contribution to the Fund ; and if, in aid of their direct contribution, the Company protect the Fund from loss by establishing fixed rates of interest and exchange, then the servants derive the further advantage of individual protection from these contingent losses to the extent of their individual property in the Fund.

“ 42. With a view to establish a Fund on such liberal principles as to ensure its success as a measure highly beneficial to the whole Service, we conceive that the Company's contribution should be proportionate to the contribution of the service, and the amount of both must necessarily be fixed in relation to the extent of the advantages which the Fund may be destined to afford.

“ 43. These advantages should certainly be considerable, because, in order that the Fund may be beneficial to the Service, it is important that all the annuities from it, as they accrue, should be accepted by old servants, so as that the Fund may not be instrumental to the retirement of young and active servants ; and it cannot be expected that old servants in the possession, as they generally are, of lucrative offices, would be tempted to retire if the annuity did not afford a material addition to such income as the party may possess.”

Then in paragraph 44, it states that the attention of the Court of Directors has been directed to four particulars : the amount of each annuity ; the number of the annuitants ; the proportion of the value of the annuity which should be paid by the annuitant ; and the security that the annuities will be regularly paid.

As to the amount of the annuity, it states, in paragraph 46, that the Directors have come to the determination that the annuities should not fall short of 10,000 rupees each, payable in England at the rate of 2s. the rupee, being 1,000*l.* sterling.

Then, as to the number of the annuities, it proceeds thus :—

“ 47. The next point which has called for consideration is the number of annuities which should be granted in each year, upon which we have found it necessary, in the first place, to determine what should be the qualification of an annuitant in respect of length of service ; and we have resolved that a Civil Servant should not be eligible to accept an annuity unless he have been actually in the Civil Service the full period of twenty-five years, or upwards, and resident in India in the Service not less than twenty-two years.

“ 48. We are also of opinion that the fund should be so constituted as to afford a reasonable expectation that, at the end of twenty-five years from the date of appointment to the Service, a Civil Servant, having completed, the term of actual residence already specified, would obtain the offer of an annuity.”

And then, in paragraph 51, it states that the Directors have determined that nine should be the number of the annuities in each year. It then enters upon the question as to the proportion of the value of the annuities which should be paid by the annuitants ; as to which it proceeds thus :

"52. The third point requiring attention, is the proportion of the value of the annuity which should be paid by the annuitants, or in other words, what shall be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity if otherwise eligible; upon which point we must observe that we consider it of essential importance that, so far as may be practicable, the advantages afforded by the Fund should be available by those eligible to receive them upon terms of strict equality.

"53. If the annuitants were all of the same age when they became such, this point could, in a great degree, be accomplished by fixing an aggregate sum as the purchase-money for the annuity; but, as the ages of the annuitants must naturally vary, it follows that to maintain strict equality, the amount of the purchase-money should depend upon the value of the annuity, which, of course, is regulated by the age of the annuitant.

"54. The Committee of the servants upon your establishment propose that 'any subscriber who may accept the tender of annuity shall be required, to entitle him to such an annuity, to pay to the institution the difference between two-thirds of the actual value of the annuity on his life and the accumulated value of his previous contributions, in case the latter quantity shall be less than the former.'

"55. But as, for the reasons already assigned, we have determined that the annuity be 10,000 rupees, we are of opinion that, in order to render that arrangement of important value to the Service, the proportion of purchase-money should be reduced, and we have accordingly resolved to fix it at one-half the value of the annuity, according to the following table, which is calculated upon the principle of our allowing an interest of 6 per cent per annum upon all the balances of the Fund, as hereafter explained, viz. :—

		Rupees.
If the age of 40 years	...	1,07,050
" 41 "	...	1,05,800
" 42 "	...	1,04,730
" 43 "	...	1,03,560
" 44 "	...	1,02,350
" 45 "	...	1,01,100
" 46 "	...	99,800
" 47 "	...	98,410
" 48 "	...	97,070
" 49 "	...	95,630
" 50 "	...	94,170
" 51 "	...	92,730
" 52 "	...	91,290

"56. Upon this principle, a servant getting an annuity at the expiration of twenty-five years' service, and at the age of forty-five, will pay altogether, including interest upon his subscriptions 50,550 rupees, for an annuity of 10,000 rupees, instead of 47,180 rupees, the sum proposed by the Bengal Civil Servants, for an annuity of 7,000 rupees.

"57. But, although in the mode here proposed, all servants, upon becoming annuitants, will pay half the value of their respective annuities, and no more, and will so far be placed upon an equal footing, yet it has not escaped our observation that there will be a material difference in the value of the risks incurred by the several subscribers of losing, by death or early retirement, the amount of their contributions."

And after pointing out in this 57th paragraph the differences of risk arising from the different amounts which would be payable by the different subscribers, and the different periods for which they would pay, it brings this part of the subject to a conclusion in the same 57th paragraph, in these words :—

"Thus it is clear that subscribers becoming annuitants during the first twenty-five years, will not have incurred a risk of equal amount, either relatively one with another, or with those who become annuitants after the expiration of that period. Of this advantage, however, existing servants could not be deprived without sacrificing one important object of the Fund, viz., the inducement which it will afford to old servants to retire; and it may also be observed that the benefit which the younger servants will derive from such retirements, together with the advantage which they will severally possess of accumulating a fund for the purchase of the annuity by gradual deposits, improved at a fixed and favorable rate of interest, will, in a great degree, countervail the difference of risk as compared with their seniors, who will not have enjoyed to the same extent the benefit either of accelerated promotion or accumulation by gradual deposits at interest."

Proceeding, then to the fourth head, that of security, it points out, in paragraph 58, that, when an annuity was granted, the value of it should be set apart; and it then enters upon the means by which the advantages to be derived from the Annuity Fund are proposed to be secured, and states those means to be—first, by subscriptions from Civil Servants, proportioned to their official income,

the rate of which is fixed at 4 per cent, upon the salaries and allowed emoluments of subscribers; *secondly*, by contributions from the Company, as to which there are the following provisions:—

“61. With a view essentially to promote the welfare of this important class of the Company's servants, to whom is entrusted the discharge of very arduous and responsible duties, and from a conviction that pecuniary advantages of equal extent could not so beneficially be communicated in any other mode, we have resolved that provided an Annuity Fund be formed in Bengal, upon the principles explained in this despatch, and under such a modification as we shall prescribe, of the regulations framed by a Committee of the Civil Servants, on the 28th January 1822, the Company shall contribute *whatever sum may be required, in addition to the contributions of subscribers, to enable the Fund to grant such number of annuities as may be accepted under the prescribed regulations, not exceeding nine per annum.*

“62. With this view we desire that the Fund be annually credited with a sum equal to the amount yielded within the year by the subscription of 4 per cent. on the official incomes of the subscribers; and that you receive into deposit, and allow interest at 6 per cent per annum to be computed annually upon the balance belonging to the Fund; we also desire that if at the expiration of five years from the date of the institution of the Fund the balance shall be less than the amount apparent in the prospective calculation contained in a subsequent part of this despatch, the Fund be credited by you with the amount of the deficiency; that if, on the other hand, the balance shall exceed the balance, so calculated, then an annual deduction, equal to the income derived from the excess of balance, shall be made either from the Company's contribution, or from the rate of interest allowed on the accumulations of the Fund, at the option of the Court of Directors; that a similar adjustment be effected at the expiration of each succeeding five years; and that, when the Fund shall have arrived at the twenty-fifth year of its operation, the table of the valuation of annuities be corrected according to the experience of the intervening period, and the Company's contribution be then finally limited to the sum which, when added to the contributions of subscribers, and to the income derived from the accumulated balance, will make a total income equal to the grant of nine annuities annually, according to the valuation which shall then be fixed.

“63. Upon the principles which we have thus explained the number of nine annuities annually is virtually guaranteed by the Company and the Company's contribution is limited to the amount necessary for the accomplishment of that important object.

“64. We have further resolved that an interest of 6 per cent. per annum be allowed on the funds set apart for the payment of annuities.”

And, *thirdly*, by fines from subscribers on becoming annuitants, which are referred to in *paragraph 66*, in these terms:—

“66. There is another large source of income; *viz.*, the difference between the accumulated value of a subscriber's contribution, and one-half of the value of his annuity. This, in the earlier periods of the operation of the Fund, will be considerable, but its amount will of course, decrease annually until the end of twenty-five years when we calculate that the accumulated value of a subscriber's contributions for the whole of that period will average 38,876 rupees; that the age of the subscriber will be about forty-five and half the value of the annuity 50,550 rupees; so that the fine to be paid up on becoming an annuitant, after having subscribed to the Fund for twenty-five years will be about 11,674 rupees. In this view, therefore, when the Fund shall have been in operation twenty-five years, its income from fines will probably average 1,05,066 rupees per annum.”

The despatch, then, after expressing the wish of the Directors to bring the Fund into operation with the least practicable delay, sets out a prospective calculation of the receipts and disbursements of the Fund, proceeding upon this footing: *first*, the ages of the subscribers at the time when they would become annuitants are estimated, the age in the 8th and subsequent years being taken to be 45, and then the average of the salaries of the Bengal Civilians at the several periods of their service are taken, and from these data the income to be derived from fines is calculated; then the entire income in each year from contributions and fines is computed, and the expenses and the value of the nine annuities at the expiration of the year are deducted, and thus the state of the Fund, at the end of each of the first twenty-four years, is ascertained; the result of the calculation, as summed up in *paragraphs 72 and 73*, being that, at the end of the 24th year, there will be an income exceeding the value of nine annuities, upon lives of 45.

Paragraphs 74 and 75 then point out possible disturbances in these calculations, in these terms:—

“74. It is probable that, in the course of the years included in the foregoing statement, some of the subscribers by obtaining accelerated promotion through the retirements occasioned by the

Fund, will have contributed a *larger amount in the shape of subscriptions than has been assumed*; but this effect will in a great degree be counter-balanced by the cases in which the contributions of subscribers will be suspended for the period of their absence to Europe under the Regulations announced in this despatch.

"75. Any variation of importance that may occur in the actual result, as compared with our calculation, will be satisfactorily adjusted by the arrangement which we have prescribed in the paragraph."

And, *lastly*, the despatch states that the Directors have determined that every annuity, as it should become due, should be paid over by the Managers of the Fund to the Government of Bengal, and issued to the annuitant by the Company in England at an exchange of 2s. the Sicca rupee.

The regulations of the Fund, as altered by the Court of Directors, which were appended to the despatch, so far as material to the question before us, were as follow:—

The subscribers were to contribute one-twenty-fifth part of their salaries and other emoluments. The annuities were fixed at 10,000 rupees each, payable in England at 2s. the rupee, being 1,000*l.* sterling. They were to be tendered to the subscribers having served in the Civil Service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the graduation list of the Service as fixed by the Court of Directors: and the right of preference was not to be barred by refusal in a preceding year.

The number of annuities was not to be more than would complete nine per annum. The actual value of annuities tendered and accepted was to be passed to a separate account on the books of the institution, under the head of Appropriated Funds, and to the debit of this account were to be entered all payments in satisfaction of annuities. Any subscriber having resided in India in the Civil Service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retiring from the Service before the option of an annuity should devolve on him, was to be entitled to the same in his proper turn, without any payment to the Fund, save what might be claimable under the following rule; and any subscriber so retiring previous to having paid the subscription for the aforesaid period of twenty-two years, was similarly to be entitled, provided he continued to contribute for the deficient years, according to the average of the contributions of those of his own standing, or made such payment in hand as the Manager should regard as equivalent. Any subscriber who might accept tender of an annuity was, in order to entitle him to such annuity, to pay to the institution previous to the date at which the annuity was to commence, the difference between one-half of the actual value of the annuity on his life, and the accumulated value of his previous contributions, in case the latter quantity should be less than the former. Any member so choosing, might decline paying the difference defined in the foregoing rule, and was in such case, to be entitled to an annuity diminished in proportion to the sum by which the accumulated value of his contributions was less than one-half of the actual value of an annuity on his life. Rules 14 and 16 were as follow:—

"14. Any subscriber who may be dismissed from the Honorable Company's Service shall forfeit all right to benefit by the institution, and be entitled to no refund of payment which he may have made.

"16. The resignation of the Honorable Company's Service is an essential condition to entitle an individual to an annuity from the institution."

The affairs of the institution were to be managed by a committee of nine, of whom four were to be *ex officio*: the Chief Secretary to Government, the Accountant-General, the Sub-Treasurer, and the Civil Auditor; the others were to be elected at a general meeting. Rule 21 was as follows:—

"21. The Sub-Treasurer of Government shall, with the permission of his Excellency the Most Noble the Governor-General in Council, be requested to act as Treasurer to the Fund, and all money, and securities for money, belonging to the fund in India, shall be kept in the Public Treasury, subject to the direction and control of the Trustees and Managers of the Fund."

The funds of the institution, as well those set apart for the payment of annuities as those arising from the accumulation of capital, were to be deposited in the Public Treasury. All questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members who might either be present at such general meetings, or vote thereat by proxy, and upon all general questions involving any increase or diminution of the rate of contributions, or any essential addition to, or alteration in, the original rules and principles of the institutions; all subscribers in India who might not be able to attend the meeting in person were to be allowed to deliver their sentiments and votes by a written communication to be signed by them and addressed to the Chairman of the meeting; provided always that no decision upon such question should be valid or have any effect until sanctioned and approved by the Court of Directors of the Company, to whom all parties considering themselves aggrieved by such decision should have a right of appeal, and the decision of the Court of Directors was, in all cases, to be final. The actual value of an annuity on the life of any subscriber was to be determined by a Table annexed. Paragraphs 34 and 35 were as follow:—

“ 34. To determine the accumulated value of the contributions of any subscriber, the Accountant shall keep separate accounts of the receipts from each member, and these accounts shall be annually made up with the rate of interest at which it shall appear the funds of the institution may have improved.

“ 35. At the close of every third year the Managers shall according to the annexed Table, calculate the actual value of the pending annuities, and shall then compare the total of their value with the assets belonging to the appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society,* and be available for the purposes of the institution. On the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter fund to the former.”

The plan of the Bengal Fund having been thus arranged, the East India Company were desirous of providing for their Civil Servants at Madras the same advantages as had been conceded to those in Bengal; and, accordingly, they caused a copy of their despatch, as to the Bengal Annuity Fund, and of the regulations under which they had given their sanction to that Fund, to be laid before the Managers of the Civil Fund at Madras, with an intimation that, if the subscribers to that institution would effect such alterations and modifications of the Annuity branch as would make it correspond with the regulations prescribed for the Bengal Fund, and would fix their subscriptions to that branch at a rate equal to that which had been fixed for the Bengal Servants, they (the Company) would be prepared to make the necessary addition to their contribution to the Fund.

In consequence of this communication the Trustees of the Madras Civil Service Fund made a Report to their subscribers, dated 22nd July 1845, by which, after noticing that the Court of Directors required a contribution of 4 per cent. upon the salaries and other emoluments of their Civil Servants, and also required the payment, as a fine, of half the estimated value of every annuity granted, after allowing the annuitant credit for his subscriptions and for interest thereupon, and after referring to the other parts of the Company's plan, and to the difficulties arising from that plan, differing in several material points from that by which the subscribers to their Fund stood pledged to one another, they proceeded to point out the rules by the introduction of which they might be enabled to carry the Company's plan into effect, and which were as follow:—

“ *Rule 1.* That the present capital of the annuity branch of the Civil Fund shall be set apart as *appropriated funds* for the payment of outstanding annuities, and of the annuities of 400*l.* which have still to be granted as lapses occur.

“ *Rule 2.* That those annuities shall be paid—*1st.* from the Honorable Court's annual Donation of 35,000 rupees to the annuity branch of the Civil Fund; *2ndly,* from the interest, at the rate of 8 per cent., allowed by the Honorable Company on the capital to be set part; and *3rdly,* as far as necessary, from the capital itself.

"Rule 3. That the subscriptions of those Civil Servants, who may assent to the plan sanctioned by the Court of Directors, shall commence at the rate of 4 per cent. on their salaries and other official emoluments from the 1st of May 1825.

"Rule 4. The credit shall be given as heretofore to each subscriber for the amount of his past contributions to the Annuity branch of the Civil Fund, but without interest; none having heretofore been allowed.

"Rule 5. That those subscribers to the Civil Fund of 1818, whom circumstances may not permit to take advantage of the Honorable Court's plan, shall continue their subscriptions at the rate of $3\frac{1}{2}$ per cent., and in their turn, as heretofore, shall succeed to annuities of 600*l.* on the terms prescribed by the Annuity Fund of 1818.

"Rule 6. That subscribers to the Annuity Fund of 1818, who may assent to the Honorable Court's plan; but may afterwards be precluded by circumstances from qualifying themselves to succeed to annuities according to that plan, shall be permitted to revert to the present Annuity Fund, under the 5th Rule.

"Rule 7. That each member of the Civil Service in India shall be required to declare his choice whether he will assent to the Honorable Court's plan within from the present
date, and each member of the Civil Service absent from India, within from the
date of his return to India."

The subscribers to the Madras Fund, at a meeting held on the 24th August 1825, approved of the adoption of the Company's plan in the mode proposed by the Trustees' Report; and the Report having been forwarded to the Madras Government, the Governor in Council approved of the mode suggested by it, as effecting as near a conformity between the Annuity branch of the Madras Civil Fund, and the plan for granting annuities sanctioned by the Court of Directors, as the nature of the case would allow; and, subject to the confirmation of the Court of Directors, sanctioned from the 1st May 1825 the operation of the new Annuity Fund in the manner suggested by the Report. Ultimately the Court of Directors, in a despatch to the Government of Madras dated the 10th of November 1826, approved of the modifications suggested by the Trustees' Report, as the means of introducing the new plan, except that, in the first instance, they declined to sanction the reversion to the old Fund by those who might join the new scheme, and be unable to complete the requisite period of service; but we collect from the Trustees' Report of the 9th October 1851, that they afterwards conceded this right. There are some passages in this despatch of the 10th of November 1826, which seem to be worthy of attention. They are as follow:—

"20. We acquiesce in the proposition that subscribers to the new Fund shall have credit for the amount of their past contributions to the Annuity branch of the old Fund, but without interest, none having heretofore been allowed: interest at the rate of 6 per cent. per annum to be computed annually, will be allowed by us upon the subscription to the new Fund agreeably to the regulations contained in our despatch to the Government of Bengal, dated the 8th December 1824.

"21. Referring to the principle explained in paragraphs 49 to 51 of that despatch, we have determined that the number of annuities to be granted annually to Civil Servants upon your establishment shall be four; which number, however, is to include any of 600*l.* and of 400*l.* to persons not yet retired from the Service, either by resignation, or by an absence of more than five years from India, as well as those of 1,000*l.* under the new plan.

"22. In order to accomplish these objects, a larger proportionate contribution than is allowed to the Bengal Fund, will probably be required from the Company, because the Bengal allowances being upon a larger scale than those of Madras, the annual contributions of the Service in the shape of percentage upon salaries will be larger in Bengal than at Madras; but, on the other hand, the eventual payments in the shape of fines or difference between the aggregate of annual contributions and half the value of the annuity to be received from annuitants who have not subscribed, or who have not long subscribed to the old Fund at Madras, may be larger than the sum to be received from annuitants in Bengal.

"23. Another circumstance, therefore, which may occasion the necessity of a larger proportionate contribution from the Company to the new Fund upon your establishment is that, as most of the subscribers have already contributed to the old Fund, the amount of those contributions will go in reduction of the sum payable upon their becoming annuitants.

"24. We have not the means of making a prospective calculation of the progress of the new Fund at your Presidency, because we are not in possession of the amounts already contributed to the old Fund by subscribers to the new Fund, which will materially affect the receipts of the latter during the first years of its operation.

"25. Neither are we informed how frequently existing annuities upon the old Fund may be calculated to fall vacant. This consideration will affect the number of annuities expected to become chargeable upon the new Fund.

"26. We desire that you, who have the means of obtaining this and all other requisite information, will cause such a calculation to be made, embracing the period comprised in the prospective calculation included in our despatch to the Government of Bengal, dated the 8th of December 1824.

"27. This computation will enable you to judge how far an annual contribution on our part equal in amount to the contributions of our Civil Servants, is likely to render the Fund adequate to the probable demands upon it. We estimate 4 per cent upon their salaries to produce 1,18,000 rupees per annum. If contribution of this sum shall be shown to be inadequate, we authorize you to increase it, provided it shall not exceed for the present, the sum of 1,50,000 rupees.

"28. You will be enabled to adjust the actual results to the necessities of the Fund every five years, as directed in the 62nd paragraph of our despatch to the Bengal Government; so that the Company's contribution, from year to year, may not materially vary in amount, and may ultimately be fixed and determined at the sum necessary to enable the Fund to grant four annuities annually.

"29. We also authorize you to credit the new Fund with interest upon the balances at the rate of 6 per cent. per annum.

"30. We shall not object to the new Fund being brought into operation from the 1st of May 1825; that is to say, that the contribution of the Service and of the Company shall commence from the 1st of May 1826."

In 1833 the rules of the Madras Fund, as established in the year 1825, were published in Madras. They provided, in the first place, for the appropriation of the capital of the Annuity branch of the Civil Fund to the payment of the outstanding annuities, and of the annuities remaining to be granted out of that Fund. Rules 4 and 5 were as follow:—

"4. That those subscribers to the Civil Fund of 1818 whom circumstances may not permit to take advantage of this plan, shall continue their subscriptions at the rate of 3½ per cent. and in their turn, as heretofore, shall succeed to annuities of pounds sterling six hundred on the terms prescribed by the Annuity Fund of 1818.

"5. That subscribers to the Annuity Fund of 1818 who may assent to this plan, but may afterwards be precluded by sickness (certified to be of such a nature as to render it improbable that they can return to the Service) from qualifying themselves to succeed to annuities according to it, shall be permitted to revert to the Annuity Fund of 1818 under the terms of the deed; but the refund of any sum in which the accumulated amount of their subscriptions to this plan may exceed the sum payable for the Annuity Fund of 1818 shall not be allowed."

The subscribers were to contribute 4 per cent. of their salaries and public emoluments. The annuities were fixed at 1,000*l.* sterling, and were to be tendered to subscribers who had served in the Civil Service twenty-five years, and actually resided twenty-two years of that period in India, according to their seniority on the gradation list of the Service, as fixed by the Court of Directors, and the right of preference was not to be barred by refusal in a preceding year. Rules 13, 14, 15, 16, 17, 22, 23, 30, 34, and 35, were as follow:—

"13. The number of annuities offered shall not be more than may complete four (4) per annum from the 1st of May 1826; these shall be tendered to all the qualified subscribers, according to the gradation list, with the understanding that persons, parties to this plan, will obtain annuities of pounds sterling one thousand on the condition herein specified, and persons, who may have adhered to the Fund of 1818, will obtain annuities of pounds sterling six hundred on the terms of that deed. Civil Servants succeeding to an annuity on this plan shall not become chargeable on the annuity branches of the Civil Funds of 1800, 1814, or 1818.

"14. The actual value of annuities of pounds sterling one thousand, or pounds sterling six hundred, as the case may be, tendered and accepted as above, shall be passed to a separate account on the books of the institution, under the head of Appropriated Funds; and to the debit of this account shall be entered all payments in satisfaction of annuities.

"15. Should any subscriber, having resided in India in the Civil Service not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retire from the Service before the option of an annuity may devolve on him, he shall be entitled to the same in his proper turn without any payment to the Fund, save what may be claimable under the following Rule.

"16. Any subscribers who may accept the tender of an annuity of pounds sterling one thousand shall be required, to entitle him to such annuity, to pay to the institution, previous to

the date at which the annuity is to commence, the difference between one-half of the actual value of the annuity on his life and the accumulated value of his previous contribution, in case the latter quantity shall be less than the former; *but should the contributions be in excess, such excess shall be refunded.* These values shall be determined as below provided. Such annuity, if required, may be made payable either to the date of decease only or quarterly, and to the date of decease; the first benefit may be secured previous to the date at which the annuity is to commence by payment, as fine, of the value of half-a-year's annuity of Company's rupees five thousand, as computed in the subjoined Table; the latter by paying, in addition to that fine, the value of an addition of Company's rupees two hundred and twenty-five, as computed in the same Table. Subscribers retiring on annuity cannot be allowed to purchase only the benefit of a quarterly payment; but there will be no objection to the other benefit being taken singly.

"17. Any member so choosing may decline paying the difference defined in the foregoing Rule, and shall in such case be entitled to an annuity, diminished in proportion to the sum by which the accumulated value of his contributions is less than one-half of the actual value of an annuity on his life.

"22. The affairs of the Institution shall be managed by a Committee of seven, of whom two shall be *ex officio*, the Chief Secretary to Government and the Accountant-General. The other five shall be subscribers, and elected at a general meeting; the members of the Committee shall be also the Trustees for the funds of the Institution.

"23. The Sub-Treasurer of the Government of Fort St. George shall, with the permission of the Right Honorable the Governor in Council, be requested to act as Treasurer to the Institution and the funds, as well those set apart for the payment of annuities as those arising from the accumulation of capital, shall be deposited in the Public Treasury, subject to the direction and control of the Trustees and Managers of the Fund.

"30. *All questions* proposed at a general meeting, whether quarterly or special, shall be determined by a majority of *three-fourths* of the members, who may either be present at such general meetings or vote thereat by proxy, but the concurrent voices of nine members, at least, shall be requisite to determine upon any question whatever; and upon all general questions involving any increase or diminution of the rate of contributions now fixed, or any essential addition to, or alteration in, the original rules and principles of the Institution which are now established, all subscribers in India may not be able to attend the meeting in person, shall be allowed to deliver their sentiments and votes by a written communication, to be signed by them, and addressed to the Managers of the Fund, accompanied, if they are at Madras on the day of such meeting, by the certificate of a medical gentleman, stating the inability of the party to attend the meeting in person; *provided always, that no decision upon such question shall be valid, or have any effect, until sanctioned and approved by the Court of Directors* of the East India Company, to whom all parties considering themselves aggrieved by such decisions shall have a right of appeal, and the decision of the Court of Directors shall, in all cases, be final.

"34. To determine the accumulated value of the contributions of any subscriber, the Accountant shall keep separate accounts of the receipts from each member, and these accounts shall be annually made up with the rate of interest allowed by the Company.

"35. At the close of every third year, the Managers shall, according to the annexed Tables, calculate the actual values of the pending annuities, and shall then compare the total of their values with the assets belonging to the appropriated funds of the institution. Should those assets exceed in value the said total, the difference shall be carried to the credit of the unappropriated funds of the society, and be available for the purposes of the institution; on the other hand, should the value of the said assets be less than the total aforesaid, the deficiency shall be supplied by a transfer from the latter Fund to the former."

At the foot of these rules there was a Table, showing the value of an annuity of 10,000 rupees on lives from 30 to 76, and there was a column in this Table in which the half value of the annuity was set out.

In the same year, 1838, the Trustees of the Madras Fund forwarded to the Government of Madras calculations which had been made by them in conformity with the requisition contained in the 26th paragraph of the despatch of the 10th November 1826, and in a letter from the Trustees which accompanied these calculations there were the following passages:—

"2. These calculations are two-fold, the *first* exhibiting the prospective assets of the Fund established by the Honorable Court, and the income with which it would commence its twenty-fifth year; the *second* the actual results for the period of ten years, from 1825-26 to 1834-35 inclusive, during which the Fund has been in operation.

"3. As stated in our predecessors' letter to your address, under date the 4th July 1827, we have experienced some difficulty in framing the required calculations, as we are not aware of the exact data on which they should be made. We have, however, carefully followed the

instructions furnished to the Bengal Government; and though we still entertain * doubts regarding the correctness of the data we have adopted, we think it better to submit the calculations, in order that they may be strictly scrutinized by the Home Authorities, and that the error, if any, may be the sooner pointed out and corrected.

"7. In the actual operation of the scheme we have made the adjustment required by the 35th Rule, regarding the actual values of pending annuities at the close of every third year. The difference which should be credited to the Fund, as directed in paragraph 62 of the despatch we have not yet applied for, because we are desirous that the calculations should be previously verified and approved by the Honorable Court; but if verified, we shall make due application for it.

"8. The Honorable Court will have now an opportunity of viewing the results of two successive quinquennial periods, and, in order to render the information complete, we have caused a separate statement to be prepared, showing the amount of fine paid by each annuitant in the years under consideration, and the age of such annuitants respectively."

These calculations were also accompanied by the accounts on which they proceeded, and in these accounts there were the following items: In the statement of the names of gentlemen who have taken annuities from 1825 to 1836, together with their ages and fines paid by them, this item, "Mr. C. Harris, 1,000*l.* (the amount of the annuity), 65 (the age), and 3,492*l.* 6*s.* 11*d.* refunded;" and in another account this item, "Amount repaid Mr. C. Harris, being the over-payment of the fine due by him."

There was also in these accounts an item of 213*l.* 6*s.* 3*d.* refunded to Mr. Wm. Oliver, on which some reliance was placed on the part of the appellants, as having been calculated to induce them to believe that these refunds were not in respect of excess of subscriptions, it being admitted that the refund to Mr. Wm. Oliver was not on that account; but it is to be observed that a sum of 4,205 rupees is mentioned in the accounts, as having been paid for fine in respect of Mr. Wm. Oliver's annuity, and that there is no mention in the accounts of any sum paid for fine in respect of Mr. Harris's annuity.

It appears also that, in the year 1838, the Court of Directors detected what they considered to be an error in some of the accounts of the Trustees of the Fund, arising from their having considered the Madras rupee as equivalent to the Sicca rupee, and gave directions by a despatch, dated the 5th September 1838, that immediate measures should be taken to correct the error.

In the year 1840, the Trustees of the Fund claimed to be entitled against the Government to credit for an appropriated balance of 4,34,494, rupees, and the letter by which the requisition was made not having been signed by the Accountant-General, one of the *ex officio* Trustees, he was called upon by the Government to state whether he considered the Civil Service to be entitled to this credit. His letter, in answer, dated 27th May 1840, contains the following passage:—

"2nd. In the fifth paragraph of their despatch to the Government of India in the Financial Department, No. 7 of 1835, dated 27th May 1835, the Honorable Court of Directors declare that they will be willing to acquiesce in a regulation to the following effect, if adopted by the subscribers, *viz.*, that, at the close of every year, the number of unaccepted annuities be publicly declared; and that two-thirds of them be appropriated to subscribers duly qualified in the order of seniority as respects the applicants within the period of three months from the time of the surplus being declared, and as respects other applicants in the order in which they may apply for annuities, upon payment of one-fourth instead of one-half of the value of the annuity; and that, in the event of the accumulated subscriptions, with interest exceeding the said one-fourth, the balance, with interest, be returned to the subscriber; that the remaining one-third of annuities, together with such of the two-thirds as shall not be claimed within the period of three years from the time of declaring the surplus, shall lapse to the Fund."

The Government of Madras also, in the year 1840, called upon the Trustees for a report on all the branches of their Fund, and the Trustees accordingly furnished these accounts. In the accounts thus furnished the re-payment to Mr. Harris again appears, and there appears also this entry: "Amount repaid to

* * NOTE.—The balance at the end of the 13th year in the prospective calculation then begins to diminish instead of increasing as previously."

Mr. N. Webb, being the over-payment of fine due by him, 9,221 rupees 9 annas 11 pie ;” and, in the letter of the Trustees, accompanying these accounts, dated the 15th April 1841, there are the following passages :—

“2nd. The enclosed accounts, marked A and B respectively, contained detailed statements of the Annuity Fund of 1825, since its commencement up to the 30th April 1840, or for fifteen complete years since its establishment, divided into its two branches of ‘unappropriated’ and ‘appropriated’ respectively, and the statement No. 1 is an Abstract of the Account A.

“3. From that statement it will be perceived, that since the years 1825-26, when the Company’s annuity plan commenced, up to last year 1839-40, during the fifteen years it has been here in operation, there has been contributed to it—

	Rs.	A.	P.
“ By the subscriptions of the Service	20,85,752	0	2
“ By the Company	20,85,752	0	2
“ * By the annuitants’ balance of fines and penalties, &c., not included in the first item	14,36,966	3	5
“ By interest	1,92,448	6	2
“ Making a total fund of rupees	58,00,918	9	11
“ From which there has been expended, for charges and re-funds	1,04,354	15	3
“ Appropriated to annuities already granted, forming what is called the ‘Appropriated Fund’	52,89,619	8	5
	53,93,974	7	8

“ Leaving a balance unappropriated, as stated at the close of account A, of rupees 4,06,944 2 3

“ This constitutes what is called the ‘Unappropriated Fund.’ ”

“ * The statements 2nd 3 show that part of their payments are also included in the 1st item to the extent of—

Rs.	A.	P.
63,329	9	0 for the reduced annuitants, 14.
6,66,796	6	11 full ditto, 46.

7,30,124 15 11

“ But these two sums include also interest, or part of the fourth item here.”

“49th. In conclusion, we have to state that when the subscriptions to the Annuity Fund of 1818 and 1825 *conjointly* exceed the fine payable by any individual claiming an annuity from the latter, *the excess has been re-paid to him* in the rare instances noted in the margin.* We notice this merely that the Honorable Court of Directors may render uniform the practice in this respect at all the Presidencies.”

	Rs.	Excess.
“ * In 1834-35 to Mr. C. Harris	3,492	6 11
“ In 1837-38 to Mr. N. Webb	9,221	9 11”

In the year 1844 a further correspondence took place between the Trustees of the Fund and the Madras Government. The Trustees applied to the Government for assistance, pointing out that the Company’s contributions to the Fund fell short of the 1,50,000 rupees, authorized by the Company’s despatch of the 10th November 1826. The Government required explanations as to the state of the Fund, and the Trustees again furnished detailed statements of the accounts, in which the refunds already mentioned, and a further like refund to Mr. Lushington in the year 1843, appeared. These accounts were forwarded to the Court of Directors, and on the 30th July 1845, they sent a despatch to the Madras Government, which contained these passages :—

“1. We approve your having sanctioned the usual number of four annuities for the Madras Civil Service for the present year.

“2. The documents which you have forwarded to us, however, clearly show that the Madras Civil Service Annuity Fund is incapable of providing for the continual grant of this number of annuities annually, without further support. Indeed, the capital on the 1st of May 1845 will amount only to 2,61,143 rupees 10 annas 6 pie, which sum, after adding to it the fines payable on the four annuities which you have sanctioned, will probably be insufficient to provide for their value to be transferred, in accordance with the Regulations, to the appropriated capital of the Fund.

"3. We were not wholly unprepared for this result. The privileges conceded to the Madras Service upon the establishment of the Annuity Fund of 1825, that previous subscriptions to the old Fund should be reckoned in diminution of the fines for annuities from the new Fund, and the grant of 600% annuities upon the terms of the old Fund, have necessarily had a considerable effect in keeping down the means of the new Fund. This possible result we had in view when, in our despatch dated the 10th of November 1826 (Public Department) we stated that, if the contribution from the Company of an amount equivalent to that from the Service, should be shown to be inadequate for the object mentioned, it might be increased, 'provided that it shall not exceed, for the present, the sum of 1,50,000 rupees.'"

In the conclusion of this despatch, the Court of Directors authorized the Madras Government to credit the unappropriated branch of the Fund with the difference between the full amount of the 1,50,000 rupees per annum, with interest at 6 per cent., and the amount which had been actually paid by them; and this credit was given accordingly.

In the year 1847, the Fund having become deficient for payment of the annuities, the Court of Directors, by a despatch dated the 23rd of June 1847, authorized the Madras Government, to pay the deficiency to meet the current payments. The 6th paragraph of this despatch was as follows:—

"6. We consider it unnecessary to enter into a calculation with the view of estimating the probable amount of a fixed annual contribution that may be required from the Company to enable the the Fund to grant four annuities annually. It will be sufficient if the necessary means be provided as the exigency arises. We, therefore, authorize you to pay to the Fund any actual deficiency to meet the current payments that may have existed in 1846-47, after the acceptance of the prescribed number of annuities, and to adopt the same course, when necessary in future years."

In another despatch of the same date, after a statement of the amount of the charge against them to meet the annuities, there is this passage:—

"6. This forms a serious demand against the Company; but we nevertheless feel that, under the arrangements which have had our sanction for the benefit of the Civil Service, we cannot refuse to meet it."

On the 6th February 1850, the Court of Directors addressed the following despatch to the Governor-General of India:—

"1. We consider it desirable to direct your attention to an important point of difference in the practice of granting annuities from the Civil Service Annuity Funds at Madras and Bombay, as compared with the practice in Bengal, in view to your devising measures to remedy the inconvenient results which we shall now point out.

"2. The point to which we allude is the system of refunding at Madras and Bombay to parties on becoming annuitants the sums which they may have subscribed to the Funds in excess of half of the value of their annuities, whilst in Bengal no such refund is allowed.

"3. In the year 1841 the question of a refund came under our consideration from Bengal, to which we replied in paragraph 2 of our despatch, dated 1st September in that year, No 29, as follows.

"With respect to refund of subscriptions, we are disposed to meet the views of the majority of the subscribers to the extent of confining refund to the excess which may have been paid beyond the half-value of the annuity, such an arrangement being in accordance with the regulations of the Fund.

"4. The Bengal Civil Service refused to adopt the principle of refunding, by passing a Rule to the contrary, whereupon a few numbers of the Service who had contributed to the Fund an amount beyond the half-value of an annuity appealed to us to obtain a return of the excess."

In reply, we stated in our despatch to the Government of Bengal, dated 20th September 1843, No. 29, that we cannot interfere in any way to relieve them from the operation of the Rules of the Civil Service Annuity Fund, and that every annuity taken must be subject to those Rules as they may exist at the time.

"5. The question of refunding to the Servants on the Bengal establishment having thus been disposed of, the point for consideration is whether the same principle should not be adopted at the other Presidencies. We admit that we have hitherto not objected to the Rules which were passed at those Presidencies, allowing the system of a refund, but we are now of opinion that the operation of such Rules is alike disadvantageous to the Service and to Government, by retarding promotion, from the continuance of men in office after their capability for efficient employment has ceased; besides which, the Company have to contribute more largely, particularly to the Madras Fund, to supply the regulated number of annuities, than was contemplated at the formation of the general scheme in the year 1825.

"6. The refunding of subscriptions, with accumulations of interest, can scarcely be justified: nor can we consider that the Funds at Madras and Bombay have any claim on the Company for additional contributions to supply the fixed numbers of annuities annually whilst any refund of subscriptions is allowed.

"7. We, therefore, desire that you will give the subject of this despatch your best consideration, with a view of procuring an alteration in the Rules of the Civil Service Annuity Funds at Madras and Bombay, in order that the principle of refunding may be abolished; and that the operation of the Funds at the several Presidencies may be uniform on the point herein specified.

"8. We shall transmit a copy of this despatch to the Government of Madras and Bombay, with instructions to them, respectively, to co-operate with you in view to proposing to the subscribers the alterations in the Rules which we have indicated."

The Court of Directors, at the same time, sent a copy of this despatch to the Government of Madras, accompanied by the following letter:—

"1. We forward in the packet copy of a despatch,* which we have addressed to the Government of India relative to a discrepancy of some importance between a Rule of the Civil Service Annuity Fund at your Presidency, which allows of contributions to the Fund in excess of half the value of the annuities to be refunded to parties on becoming annuitants, and the Rule in Bengal, which precludes a refund.

"2. We have expressed our opinion to the Government of India of the disadvantages attending the refunding system, and we desire that you will adopt such measures, in co-operation with that Government, as may appear best calculated to induce the Civil Service at your Presidency to abrogate it."

The Governor-General of India, afterwards, on the 30th March 1850, in pursuance of the despatch of the 6th February 1850, wrote to the Government of Madras, requesting that the views of the Court of Directors should be submitted to the Managers of the Fund at Madras, with the desire that they would circulate, for the consideration and votes of the Service, how far they might be willing to accede to the Court's wishes that the practice of refund, hitherto allowed by the rules of the Madras Fund, should be abrogated. The despatch of the Court of Directors was accordingly forwarded to the Trustees of the Fund, and a special meeting of the subscribers to the Fund was summoned by them for purpose of considering the question, whether the practice of refund, hitherto allowed, should be abrogated. This meeting was held on the 26th September 1850, when the votes of the subscribers, having been taken upon the proposition, a majority of more than three-fourths were against the abrogation of the practice. This result having been communicated to the Madras Government, and by them to the Court of Directors, the Court, on the 20th May 1851, sent the following despatch to the Madras Government:—

"1. The proposition for abrogating the Rule of the Madras Civil Service Annuity Fund, which provides for refunding to its members, on becoming annuitants, the amount which they may have contributed in excess of half the value of their annuities, having been circulated for the votes of the Service, and rejected, we consider, it necessary to lay down a principle for regulating the interest to be allowed on such excess when it occurs.

"2. We therefore direct that 4 per cent, annual interest, only be allowed on the subscriptions of members in excess of half the value of their annuities, and that their accounts with the Fund be adjusted accordingly."

In the year 1851 the period having arrived when, according to the calculations, made upon the institution of the Fund, there ought to have been an accumulation sufficient to answer the four annuities, the Trustees furnished to the Government of Madras, to be laid before the East India Company, accounts containing a review of the Fund from its commencement down to that date, from which it appeared that the Fund was wholly deficient. In these accounts, the refunds already mentioned and several others (there were in all nine refunds), appeared. The Court of Directors had before this time, in a despatch, dated the 20th August 1851, communicated to the Madras Government, and through that Government to the Trustees, their determination that refunds of excess of subscriptions were in no case to be made at the expense of the Government; and, after the receipt of the last-mentioned accounts in

* "No. 5, dated February 6, 1850."

the month of October 1852, they addressed another despatch to the Madras Government, dated 20th October 1852, which contained this passage :—

" 19. We must here remark upon the practice which has been allowed at Madras, of refunding to retiring subscribers any balance of subscriptions, standing at their credit in excess of the half value of their annuities. The original rules, as sanctioned by us, made no provision for that purpose. It would appear, however, that in 1838, the Trustees inserted, in a new edition of the Rules, a clause to the effect that, if the contributions of any subscriber be in excess of the half value, 'such excess shall be refunded.' But this Clause, so far as we can ascertain, was never submitted to the subscribers, as required by the Rules. It certainly never received our sanction ; it was not even reported to us ; and yet it has been acted upon as if it had been duly authorized. We observe that, since the institution of the Fund of 1825, there have been nine cases in which this refund has been granted, to the aggregate amount of 1,89,529 rupees 7 pie, and that in the last year, 1850-51 (which, being the twenty-sixth year of the Fund's existence, is not embraced in the present calculations), there was a further re-payment allowed to the amount of 9,623 rupees 6 annas 10 pie. The sums refunded have, of course, contributed to swell the deficit of the Fund. This deficit has been made up from the Government Treasury, upon which, consequently has fallen exclusively the charge of the refunds. Of the whole number, no less than three aggregating 86,749 rupees 7 annas, 8 pie, were granted in the year, 1849-50 when there was a deficiency (irrespective of the amount refunded) to the extent of 1,02,654 rupees, 1 anna 2 pie. In that year, therefore, when the contribution from the State was augmented to the sum of 2,52,654 rupees, a further burden, which raised that sum to the large total of 3,39,403 rupees, * was thrown on the public, for the improper object of making refunds—an object which, even in the most prosperous condition of the Fund, could not be pursued without weakening and ultimately destroying it. In every case in which a refund has been granted, there was a balance of subscriptions of the old Fund at the credit of the party before the year 1828. The result is, therefore, that the Fund has absolutely paid away as refunds sums which it never received and which, moreover, in accordance with the provisions of the Deed of the Fund of 1818, ought not to have been refunded to any of the subscribers to that Fund. We regard with strong feelings of disapprobation the whole of this most irregular proceeding, and we repeat the desire we have recently expressed, that no refunds be upon any account allowed in future."

With this despatch, the Court of Directors also forwarded to the Madras Government proposed new Rules for the regulation of the Fund, in which the provision for refund, contained in the Rules published in 1838, was omitted ; and the 8th of these Rules being as follows :—

" 8. Every subscriber to whom an annuity shall be assigned shall be required, in order to entitle him to the full annuity fixed by Article II, to pay, on or before the date from which the annuity is to commence, the difference between one-half of the value of the annuity and the accumulated amount of his contributions, whenever the latter shall be less than the former."

These Rules were taken into consideration at a special general meeting of the subscribers to the Fund, which was held on the 17th June 1853, and were then adopted by the subscribers, and the differences between the Company and the Trustees appear then to have ceased.

The respondent, Andrew Robertson, however, was a subscriber to the Fund of 1818, and, upon the institution of the Fund of 1825, became a subscriber to that Fund. In the years 1842, 1843, 1844, 1850, and 1851, he was informed by letters from the Secretary of the Fund that annuities were open for acceptance, and was invited to state whether he would accept an annuity of 1,000*l*. Each of these letters contained a passage in these words :—

" 4. In order to entitle you to the full annuity of 1,000*l*., it is necessary that, before the time of the commencement of your annuity, you shall pay the difference between one-half of the value of an annuity of 1,000*l*. for your life, and the accumulated value of your previous contributions, these values being determined in the manner provided by the rules of the institution. In the event of your not paying that difference you will only be entitled to

* " Contribution of East India Company	...	...	Co.'s Rs.
" Deficit	...	...	1,50,000
" Amount refunded	...	...	1,02,654
		...	86,749
" Total			3,39,403"

an annuity diminished in proportion to the sum by which the accumulated value of your contribution is less than one-half of the actual value of an annuity on your life."

The respondent does not appear to have taken any notice of these letters; but, on the offer being again made to him in the year 1852, by a letter from the Secretary of the Fund, dated the 15th October 1852, in the same terms, he wrote to enquire whether, in the event of his accepting the annuity, the Trustees would refund to him the excess of his subscriptions beyond the amount payable for the annuity, the amount of his subscriptions having, it appears, equalled the half-value of the annuity in or about the year 1848. In answer to this enquiry, the respondent was referred by the Secretary to the despatch of 1851, prohibiting the refund of subscriptions unless the existing state of the Fund would permit it, which he was informed it would not then do. The respondent then returned the Secretary's letter of the 14th October 1852, with the following Memorandum, signed by him, at the foot of it:—

"I agree on the terms above specified, to accept the annuity conditionally tendered to me, provided that on retirement the excess which may be paid by me, with interest, beyond the half-value of an annuity of 1,000*l.*, payable to the date of decease, and by quarterly payments, be refunded to me; not otherwise. (*Vide* separate letter transmitted with this).

"It is my wish to have the said annuity made payable by quarterly instalments, and to the date of decease.

"A. ROBERTSON."

"Waltair, November 17, 1852."

And he at the same time wrote to the Secretary as follows:

"To S. D. Birch, Esqr., Secretary to the Civil Fund, Madras.

"SIR,

"Waltair, November 17, 1852.

"I have the honor to acknowledge the receipt of your letter under date 9th ~~instant~~, informing me that the despatch of the Honorable the Court of Directors, No. 16, of 1851, prohibits the refund of excess subscriptions, unless the existing state of the Annuity Fund permit of it, which it does not at present; and transmitting a Memorandum exhibiting the probable amount which will have been paid by me on the 1st May 1853, beyond the half-value of an annuity of 1,000*l.*, payable to the date of decease, and by quarterly payments.

"Together with this communication, I transmit my acceptance of one of the four annuities open to the Service, on condition of my being allowed the refund of the excess of my subscriptions beyond one-half of the value of an annuity, &c.; and I beg leave to prefer a claim to this on the fundamental principles of the constitution of the Fund, as laid down by the Honorable Court.

"I would here observe, with all respect, that when I became a subscriber to the Annuity Fund, I did not become a party to a Joint Assurance Association, the benefits to be derived from which were contingent on the future prosperity of the Fund; but I subscribed to certain terms, the principal of which, as laid down by the Honorable Court, was, that 'all servants, upon becoming annuitants, would have to pay half the value of their respective annuities, and no more.' That the Civil Annuity Fund is exclusively the Fund of the Honorable Court, and not of the Civil Service, was shown in the proceedings on the admission of Mr. Hutt, and others to annuities not provided for by the original terms on which the Fund was established.

"It is unnecessary to revert to all that has been advanced, and might be advanced again, to show that those who agreed to become parties to the Honorable Court's Annuity Fund did so, on the plain and simple understanding that, under no contingency whatever, were they to pay more than half the value of an annuity, according to age, when entitled to it, after a certain period. It is necessary for me only to observe that I have fulfilled the agreement, on my part which entitles me to one of the four annuities now open as guaranteed by the Court. It is upwards of thirty-five years since I arrived in the country,* my actual residence in the country much exceeds the period required; and my subscriptions to the Fund are greatly in excess of half the value of an annuity of 1,000*l.*

"Having fulfilled the conditions of the agreement on my side, I respectfully solicit the fulfilment of them on behalf of the Honorable Court. I now prefer a claim to an annuity of 1,000*l.*, at half its value and I ask that I may have it at half its value, 'and no more' the surplus of interest and subscriptions, appearing at my credit with the Fund, being repaid to me on my retirement from the Service, between the 1st May and 1st July 1853.

"I seek for this from the known justice of the Honorable Court, and the consideration they evince for their servants in every department. I may assuredly trust that subscribers to the Civil Service Annuity Fund will not be regarded in a light less deserving consideration than were subscribers to the Native Pension Fund, who, when that Fund could no longer meet

* 26th June, 1817.

its engagements, received back from the justice of the Court their subscriptions, with interest the annuities already granted being, at the same time, continued at the expense of Government.

"I would, in conclusion, request that the Trustees will do me the favour to submit this letter for the consideration of the Right Honorable the Governor in Council, when reporting the names of those gentlemen to whom annuities may fall this year.

I have the honor to be,

SIR,

Your most obedient Servant,

A. ROBERTSON."

The Trustees, it appears, sent a copy of this letter to the Government, but nothing appears to have been done upon it, and in September 1853, the annuity was again offered to the respondent, with reference to the revised Rules of the Fund. To this offer the respondent replied as follows :—

"To the Secretary to the Civil Fund, Madras.

"SIR,

"Waltair, October 11, 1853.

I have the honor to acknowledge the receipt of your letter, tendering for acceptance one of the annuities declared to be available from the 1st May next.

"Until the receipt of that communication, I was under the impression that no change had taken place in the Rules already in force, the changes which had been proposed to the Service not having been ratified by the Honorable the Court of Directors, as required by Rule 30 of the Regulations of the Fund.

"As the introduction of the proposed new Rules before the allotment of the annuities at present under offer might be hereafter advanced as a technical objection to my claims, I beg leave to enter my protest against the enforcement of them before they receive the formal sanction of the Honorable Court.

"Under this protest, I request that you will inform the Trustees that I am ready to accept one of the annuities now tendered; provided they are prepared to pay to me, on my retiring from the Service, the amount which may be at my credit in the accounts of the Fund in excess of the half-value of an annuity payable by a Civil Servant at the age which I shall then have attained.

"I have, &c.,

"(Signed) A. ROBERTSON."

The Trustees, however, declined to receive a conditional acceptance of the annuity, and upon their refusal to do so, he again wrote to the Secretary in these terms :—

"To the Secretary to the Civil Fund, Madras.

"SIR,

"Waltair, September 25, 1854.

"I have the honor to acknowledge the receipt of your letter under date the 19th instant, tendering for my acceptance one of the annuities which will be available on the 1st May 1855, and to request that you will inform the Trustees of the Civil Fund that I am quite ready to avail myself of this offer, on the condition of their allowing me the refund of the amount overpaid by me to the Fund, together with interest, as formerly allowed to those members of the Civil Service who obtained a refund of over-subscriptions. I do not conceive that any votes of the majority of the Civil Service for the introduction of new regulations can affect a right acquired and asserted before the recent changes in the Civil Fund Rules were even proposed.

"I have, &c.,

"(Signed) A. ROBERTSON."

The Trustees, however, still declining to accept the conditional offer, he ultimately, on the 17th October 1854, wrote to them as follows :—

"To the Secretary to the Civil Fund, Madras.

"SIR,

"Waltair, October 17, 1854.

"I have the honor to acknowledge the receipt of your letter, under date the 7th instant and, in consequence of the Trustees again declining to entertain a conditional application for an annuity, to apply for one of the annuities available on the 1st May 1855, under protest, and with the full reservation of all my rights.

"It is my desire to secure the full amount of annuity.

"I was born on the 28th November 1799. Should this form of application be objected to, which I do not expect, I request that you will send an answer to my address by the 30th instant, under cover to Mr. Will. Arbuthnot at Madras.

"I am, &c.,

"(Signed) A. ROBERTSON."

And in reply to this letter the Secretary wrote to him thus :—

“To A. Robertson, Esquire.

“SIR,

“With reference to your application, dated 17th October 1854, I am desired by the Trustees of the Civil Fund to acquaint that an annuity of 1,000*l* has devolved on you by rotation. The statement showing the amount of subscription paid by you, together with the document which will enable you to draw your annuity by quarterly instalments, and to the date of decease from the Honorable the Court of Directors, will be forwarded in due time.

“ (Signed) S. D. BIRCH.”

“November 8, 1854.”

The respondent having thus accepted the annuity under protest, and with full reservation of his rights, on the 28th March 1857, filed his Bill in the Supreme Court of Judicature at Madras, against the Company and the Trustees, to recover the excess of his subscriptions beyond the half-value of the annuity, and it is upon this Bill the decree under appeal was made.

Three points arise, and were argued upon the appeal :—

1st. Whether, according to the original constitution of the Madras Civil Service Annuity Fund, as established in 1825, the respondent was entitled to have refunded to him the excess of his subscriptions to the Fund beyond one-half the value of his annuity ?

2ndly. Whether, if the respondent was not so entitled, according to the original constitution of the Fund, he afterwards became so entitled by virtue of any contract or by reason of any course of dealing or conduct on the part of the East India Company or of the Trustees ?

And *3rdly.* Whether, if the respondent was so entitled, either according to the original constitution of the Fund, or by virtue of any subsequent contract, course of dealing, or conduct, the right which he thus required has been in any manner lost or destroyed ?

The first of these questions appears to their Lordships to be open to very serious doubts, and in the view which they have finally taken of the case, it might not be necessary for them to pronounce any opinion upon it ; but the point was so fully and ably argued at the Bar, and it is so difficult fairly to estimate the weight which is due to the subsequent transactions, without first considering the position in which the parties originally stood, that their Lordships think it right to state the conclusion at which they have arrived on this part of the case.

The Rules and Regulations of the Madras Civil Service Annuity Fund, as established in the year 1825, were derived from the Rules and Regulations of the Bengal Fund then lately established, modified also so far as was necessary to meet the difficulties arising from the existence, at Madras, of the Funds created by the deeds of 1800, 1814, and 1818, and from the obligations consequent upon those deeds. The modifications, which were introduced to meet these difficulties and obligations, do not appear to their Lordships to affect the question as to the refunding of the excess of subscriptions, otherwise than as they would affect the Fund out of which the refund, if any, would be to be made ; and the East India Company must of course, be taken to have foreseen to what extent the Fund would be thus affected. It is, indeed, plain, from the evidence, that they did foresee the effect which the modifications would have upon the Fund. In considering this first question, therefore, it appears to their Lordships that these modifications may be laid out of the case, and that the question must depend upon the interpretation to be put upon the despatch of the 8th December 1824, and the Regulations for the Bengal Fund as altered by the Court of Directors : for their Lordships do not agree to the appellant's argument that a part only of this despatch is to be looked at. Both the despatch and the regulations were forwarded to the Madras Government, and delivered to the Trustees of the then existing Madras Funds. Both of them formed the basis

of the contract with the Madras subscribers, and each of them must, in their Lordships' opinion, be looked at in its entirety in determining what that contract was.

This despatch, in paragraph 41, notices the fact that, according to the constitution of the then existing Funds at Madras, the grantees of annuities either paid in subscriptions to the Fund a certain aggregate sum, or paid the difference between that sum and the amount of their subscriptions.

In paragraph 41, in pointing out the advantages derived from the Company's contributions, the despatch speaks of the Civil Servant when he retires having, in addition to his own savings, whether accumulated in the shape of contributions to the Fund, or in any other mode, an annuity proportional to his share of the Company's contributions to the Fund.

In paragraphs 53, 54, and 55, in treating of the purchase-money of the annuities, it fixes the amount at the difference of half the value of the annuity and the accumulated value of the subscribers' previous contributions; and in paragraph 57, it states broadly that, according to the mode proposed, all servants, upon becoming annuitants, would pay half the value of their respective annuities, and no more; and, in the same paragraph 57, it refers to the advantages which the subscribers would possess of accumulating a fund for the purchase of the annuity, by gradual deposits, improved at a fixed and favourable rate of interest; and Rule 11 of the Regulations, as altered, provides for subscribers who may accept annuities, paying to the Institution the difference between half the value of the annuity, and the accumulated value of their previous contributions, in case the latter quantity shall be less than the former. These provisions certainly point at half the value of the annuity as the sum which each subscriber, on becoming an annuitant, was to pay for the purchase of his annuity, paying it either by contributions or by making good the deficiency of his subscriptions. But, on the other hand, the expression "no more," in paragraph 57, so much relied on upon the part of the respondent, may, as was suggested on the part of the appellants, have meant only that the subscribers were to pay one-half, and not two-thirds of the value of the annuity, the proportion which in paragraph 54 is mentioned to have been proposed by the Bengal Civil Servants, although the contest does not appear to their Lordships to favor this conclusion; and whatever the meaning of these words "no more" may have been, there is certainly no limit to the payment by subscribers of their annual contributions, and no provision for refunding any excess of those contributions beyond the half of the value of the annuity; and by paragraphs 61 and 63, what the Company are to contribute, is expressed to be whatever sum may be required in addition to the contributions of subscribers, to enable the Fund to grant such number of annuities as may be accepted under the prescribed Regulations, not exceeding nine per annum, and the obligation of the Company is expressed to be a virtual guarantee of the nine annuities, and a contribution limited to the amount necessary for the accomplishment of that object; and all these latter provisions indicate that all the subscribers' contributions, whatever the amount of them might be, were to go into, and remain in, the Fund.

It is very difficult to collect from a despatch and from rules thus loosely worded on so important a point, and plainly imperfect in other respects, what the real meaning of the parties was; but it is to be observed that the object which they had in view was, as appears by Sections 35, 36, and 42, to provide a Fund for the payment of annuities to the Civil Servants who should retire from the Service; and that the payments of each subscriber were not merely for the purpose of purchasing his own annuity, but of providing annuities for the other subscribers. The payments made by each subscriber were to go into the Funds, to be applied for the benefit of all the subscribers; and they were to do so equally, whether the subscriber who made the payment, had or had not paid the half-value of his annuity, or had or had not had the option of an annuity. There cannot, as it seems to their Lordships, be any reasonable doubt that each

subscriber was intended to go on paying his subscription until he had the option of an annuity ; and, if the option did not reach him before the amount of his subscriptions exceeded the half-value of his annuity, their Lordships find it difficult to suppose that it could have been intended that a refund should be made to him when the amount which he had paid would or might have been applied to the payment of other annuities ; and, if it was not so intended in the case suggested, their Lordships think it scarcely less difficult to suppose that it could have been so intended when the subscriber had had the option of the annuity, and had refused it, in which case it is to be observed that his refusal would bring upon the Fund the charge to which his payment was applicable. If the half-value of the annuity was in all cases to be the limit of the subscriptions, there seems to be no reason why the payment of the subscriptions was to continue after the half-value of the annuity had been paid ; for the annuity would, of course, decrease in value as the subscriber advanced in age, and the benefit of accumulation held out to the subscribers in the despatch is confined to accumulation for the purchase of the annuity. It is to be observed, too, that the calculations on which the despatch proceeds, are founded upon the assumption that each subscriber would, after the expiration of the first few years, become entitled to an annuity at the age of forty-five in which event, according to the calculations, he would in no case have paid half the value of his annuity ; and it seems probable, therefore, that it was not thought necessary to provide for the excess of the subscriptions.

In that view of the case, what has occurred in this instance and in others, would be left unprovided for by the contract ; and it being clear that the subscription was properly payable into the Fund, there would seem to be no ground for taking it out again.

The case does not appear to their Lordships to be one to which the doctrine of resulting trust could be applied.

After weighing all these considerations on the one side and the other, the better opinion appears to their Lordships to be that, if this case was to be decided upon the first point only, the decision ought to be in favor of the appellants, the East India Company ; but their Lordships have not come to this conclusion without great doubt and hesitation, and they very much incline to the opinion that this contract does not provide for the event which has occurred, and that, in order to determine the rights of the parties, what has subsequently occurred must be looked at, not, indeed, for the purpose of varying the contract, but for the purpose of supplying what has been left unprovided for by it. They proceed, therefore, to the consideration of the second point.—Whether the respondent became entitled to the refund of his excess of subscriptions by virtue of any subsequent contract, or by reason of any conduct or course of dealing on the part of the East India Company, or of the Trustees ?

It is material in considering this point, in the first place, to observe the position in which the East India Company stood under the contract. By the contract, whatever its effect may have been in other respects, the annuities were to be provided for by the contributions of the subscribers and the contributions of the Company. These contributions were to be received by the Trustees, and applied by them to make good the annuities, and the deficiency was to be supplied by the Company. The Company, therefore, had a direct and immediate interest in the application of the Funds by the Trustees. The Trustees were responsible, not merely to the subscribers, but to the Company, for the due application of the Funds. The Company, then, being in this position—having the right to call for the accounts of the Trustees, and to check and control those accounts, we find that the practice of refunding to subscribers the excess of subscriptions beyond the half-value of the annuity, commenced as early as the year 1834 : for in that year there was a refund to Mr. Harris on this account. We then find that, in the year 1838, accounts of the Trustees in which this refund appeared, were laid before the Government of

Madras, and that in the same year 1838, the Rules of the Fund were published at Madras, and that, by the 16th of those Rules, as published, it was expressly stated that the contributions of the subscribers in excess beyond the half-value of their annuities were to be refunded. We further find that this course of refunding to subscribers the excess of their subscriptions was continued by the Trustees in the years 1837, 1843, 1845, and 1848; that accounts of the Trustees, showing these refunds, were laid before the Court of Directors; and that no objection was made to them, although on other minor points objections were raised and the accounts were required to be rectified; and although, in the year 1841, the attention of the Government was directly called to the point, and in the years 1844 and 1847 they were required to make, and did make, additional payments to the Fund. We also find that it was not until the year 1850 that any question was raised as to this practice of refunding: and that the question then raised was not as to the right of the subscribers to the refund, but as to the expediency of continuing the practice; that the Company then, so far from asserting that the subscribers were not entitled to the refund, desired the Madras Government to adopt such measures as might induce the subscribers to abrogate the practice; that, with this view, they submitted the question to the consideration of the subscribers; and that upon the subscribers adhering to the practice, they did not, in the first instance, persist in objecting to it otherwise than by threatening to reduce the interest upon the excess of the subscriptions—a threat, which, it appears, they did not carry into effect. Ultimately we find that, later in the year 1851, they objected to the refunds being made at their expense, and that in the year 1853, the system of refunding was put an end to by the new Rules proposed by them, and adopted by the votes of the subscribers. Upon these facts, this part of the case appears to their Lordships to present two questions for their consideration:—1st, whether, assuming the practice of refunding to the subscribers the excess of their subscriptions beyond the half-value of the annuity, not to have been warranted by the original Rules, there was not such an alteration of those Rules as was sufficient to warrant it; and 2ndly, whether, even if there was no such alteration of the Rules, the Company have not, by their conduct, precluded themselves from disputing the right of the subscribers to the refund.

With respect to the first question, by Rule 30 of the Bengal Regulations, all questions proposed at a general meeting, whether annual or special, were to be determined by a majority of three-fourths of the members, and upon all general questions, involving, amongst other things, any essential addition to, or alteration in, the original rules and principles of the institution, all subscribers in India were to be allowed to vote; but no decision upon such question was to be valid, or to have any effect, until sanctioned and approved by the Court of Directors of the East India Company, whose decision was in all cases to be final. This rule became part of the original Rules of the Madras Fund. The Rules of that Fund, published in 1838, having contained the provision that the excess beyond the half value of the annuity should be refunded, the question whether that practice should be abrogated was put to the vote at a special general meeting of the subscribers held on the 26th September 1850, and it was determined by a majority of more than three-fourths that the practice should not be abrogated. There was here, therefore, upon the assumption that the original Rules did not warrant the practice, a clear alteration of those Rules, made in conformity with the 30th of the original Rules, and this alteration, if sanctioned and approved by the East India Company, was valid and effectual.

Now, how did the Court of Directors deal with this alteration of the Rules? They did not repudiate it; but they directed the interest upon the excess of the subscriptions to be reduced—a direction, however, which was not carried into effect. If the case had rested here, they might, in the opinion of their Lordships, well be taken to have sanctioned and approved this alteration of the Rules; but it appears that they afterwards in the same year, 1851, protested against any further

refunds being made at their expense, and, although they did not rest upon this protest, but subsequently, in the year 1853, in some measure treated the alteration as valid by again, in effect, submitting the question to the votes of the subscribers upon the new Rules which they at that time proposed, and which were then adopted, they do not appear ever to have withdrawn their protest, and the course which they adopted in proposing the new Rules may well be regarded as having been resorted to for the more conclusive settlement of the question. If the subscribers had not adopted those Rules, the Company could not, as their Lordships think, be held, in the face of their protest, to have sanctioned and approved this alteration; and upon the whole, therefore, their Lordships consider that, whatever effect may be due in other respects to what passed as to the alteration of the Rules, it would be going too far to hold that the resolution of the subscribers in 1851 effected such an alteration as rendered it obligatory upon the Company to refund the excess of the subscriptions. There remains, then, on this second head of the case, the question as to the effect of the course of dealing and conduct on the part of the Company and of the Trustees.

Now, it appears to their Lordships to be put beyond all doubt, by the evidence in this case, that the Company sanctioned the refunds which were made, and sanctioned them, not merely with reference to the individual subscribers to whom they were made, but, generally, as having been made in the due course of practice. The Company's despatch of the 6th February 1850, admits this to have been the case. Their course of proceeding, in submitting the question to the votes of the subscribers in that year, involves the same admission; and there is, indeed, hardly a step in all their proceedings, from the time of the institution of the Fund in the year 1825, which does not lead to that conclusion. In determining the consequences which are to follow from this conduct on their part, we must again revert to their position, and to that of the Trustees. The Company stand in the position of the ultimate beneficiaries of the Fund with which we have, in this case, to deal, subject to prior trusts for the benefit of the subscribers.

The Fund, as established in 1825, was instituted on their suggestion, and for the purpose of carrying out their views of promoting more rapid succession among the Civil Servants of their establishment. The Trustees were bound not to them only, but to the subscribers also, for the due management of the Fund, according to the Rules. If those Rules did not authorize the refund being made, it was a breach of trust on the part of the Trustees to make them, and in that breach of trust the Company were concurring. It was admitted on their part that, with respect to the refunds actually made, they had no right to complain; but it was argued that the consequences of their conduct went no farther, and that they cannot be held to have sanctioned the right of the subscribers to the refund in other cases. Their Lordships, however, find themselves unable to give their assent to this argument. By the Rules of the Fund, published in the year 1838, the Trustees held out to the subscribers generally that they were to be entitled to the refund of the excess of their subscriptions beyond the half value of the annuity. The Company, as appears from their answers, knew of the publication of these Rules very soon after they were published. By allowing the refunds which were made, more especially after their attention had been called to the subject in the year 1840, they must, as their Lordships think, be considered to have authorized the Trustees to continue this Rule as to refund, as part of their rules. It is to be considered, then, how the subscribers were affected by the publication and continuance of this Rule, and it appears to their Lordships that their position was much altered by it.

To take, for instance, the case of this respondent: He was a subscriber to the Fund of 1818, and, according to the Rules of that Fund would have been entitled to an annuity of 600*l.* a year after payment of a specified sum. Is he not justly entitled to say that he paid the larger subscription to the Fund of 1825, and continued that subscription, upon the faith that he would be entitled to the larger

annuity of 1,000%, and also to the re-payment of the excess of his subscriptions beyond the half value of his annuity? And further, is he not also justly entitled to say that, had he been aware that the Trustees or the Company would resist the re-payment of the excess of his subscriptions, he would have accepted his annuity on the first opportunity which offered after he had paid the half of its value, or even before that time, when his interests or his views rendered it advisable or convenient for him to do so; and is not his having been deprived of these opportunities the result of the Company's conduct?

The true result of this case, with reference to the point now under consideration, appears to their Lordships to be that the ultimate beneficiaries under the trust have authorized the Trustees to hold out to the prior beneficiaries advantages which were not warranted by the trust, and have thereby altered the position of the prior beneficiaries; and their Lordships think that, under such circumstances, both the Trustees and the ultimate beneficiaries must be liable to make good to the prior beneficiaries the advantages which have been so held out to them.

The case was to some extent argued on the part of the company as if the question had, been simply this: whether the Trustees could recover at law against the Company any deficiency of the Fund for payment of the annuities occasioned by this practice of refunding? But their Lordships do not take that view of the case; they consider that, whatever might be the case at law, there is under the circumstances of this case, an equity by which the Company is affected. It was also argued, on the part of the Company, that their conduct, and the conduct of the Trustees throughout, proceeded upon a mistaken supposition that the original Rules of the Fund, resting upon the Bengal Rules, required this excess to be refunded, and that they ought not to be bound by conduct resulting from such a mistake.

It would, perhaps, be a sufficient answer to this argument to say that there is no Bill to rectify any such supposed mistake; but their Lordships do not desire to rest their judgment upon so narrow a point.

Supposing the case to be entirely open upon this point, could the Company, and could the Trustees, under the circumstances of this case, be relieved from the consequence of this alleged mistake? Their Lordships are of opinion that they could not. They think that it would be an answer to such a case of alleged mistake that, when the Trustees made the representation as to the refund of the excess which is contained in the Rules of 1838, and when the Company sanctioned that representation being made, they had possession of all the documents, and the full means of judging whether the Bengal Regulations did or did not give the right of refund; and further that, whether the Bengal Regulations did or did not give that right, the Company had the power of determining whether it should or should not be given at Madras; and yet further that the conduct of the Company, and of the Trustees, has altered the position of the subscribers. They think also that, if this case was at all to be dealt with upon the footing of mistake, it would follow that the contract must be wholly undone, and the parties be restored to their original rights, and that the conduct of the Company has placed the subscribers in a position in which they cannot be restored to those rights. The subscriptions which have been paid beyond what ought to have been paid might, indeed, be refunded, but the parties could not be set right as to the period when they would have taken the annuity. It is hardly necessary to add that the case appears to their Lordships to be more strong against the Company from their having been parties to the contract, and having bound their Civil Servants by covenant to the observance of it.

Upon this second head of the case, therefore, their Lordships are of opinion that the Company, though not bound by any positive alteration of the Rules, are precluded by their conduct from disputing the right of the respondent to have the excess of his subscriptions beyond the half-value of his annuity refunded to him.

We come then to the third question, whether the right to the refund of the excess of his subscriptions which the respondent acquired has been in any manner lost or destroyed. It was contented on the part of the appellants that it had been lost or destroyed, because the revised Rules of 1853 did not contain the provision for refund which was contained in the Rules of 1838, and the respondent, being a subscriber to the fund, was bound by those revised Rules; but it does not appear to their Lordships that the revised Rules could operate retrospectively to destroy rights which had been acquired before they were passed.

Upon this point, therefore, the question, as their Lordships view it, is, whether the respondent had or had not, before the revised Rules were passed, acquired a little to the refund of the excess of his subscriptions; and their Lordships are of opinion that he had: for in the year 1852 he had accepted the annuity on condition that the excess of his payments should be refunded to him. The Trustees, it is true, refused to receive this conditional acceptance, but in their Lordships' judgment, for the reasons already given, it was an error on their part not to have done so, and the respondent cannot, as their Lordships think, be affected by this erroneous judgment of the Trustees. They think, therefore, that the respondents' title to the refund was complete in 1852, and was consequently unaffected by the revised Rules of 1854. Their Lordships, therefore, will humbly recommend Her Majesty to dismiss this appeal, and, their judgment agreeing with that of the Court in India, to dismiss it with costs.

The 23rd June 1859.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge and Sir L. Peel.

Deed of Partition based on a compromise—Reversal of—Nature of proof necessary.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Maharajah Hetnarain Sing.

versus

Modnarain Sing,

A deed of partition between two brothers based on a compromise of suit, ratified by a decree of the Sudder Court, and putting an end to litigation previously entered into by their father, cannot be set aside without strict proof of haste and precipitancy of the settlement, inequality, restraint, or coercion, or fraud.

THIS is an appeal from a decision of the Sudder Dewanny Adawlut at Calcutta, confirming a decision of the Zillah Court of Behar, by which the appellant's suit was dismissed with costs. That suit was instituted to set aside a deed of partition, which had been executed by the appellant, and his brother, the respondent, and which partition was, as to the shares of the brothers, based on a solenamah, or instrument of compromise of suit, ratified by the decree of the said Sudder Court. This compromise was entered into a suit in which the appellant was the plaintiff, and his father Maharajah Mitturjeet Sing; and the appellant's younger brother Modnarain Sing, were the defendants. That suit involved serious and important questions of difficulty concerning the partibility of, and succession to, the estates and property of the father, held by him in connection with his Raj, and his power of disposing of any part thereof by alienation in his life-time. It involved also the validity of a donation by him to his son Modnarain, and a further question whether the plaintiff had forfeited his inheritance by disgraceful conduct involving a loss of caste.

The appellant had succeeded in the inferior Court, and from the decision of that Court, the Maharajah had appealed. In the course of the suit examinations

had been mutually made by the father and the son, and the litigation, had it proceeded, would probably have caused to the family much pecuniary loss and some disgrace. By the compromise, a family arrangement, was affected, by which the father agreed to pay certain allowances to his sons respectively during his life; they confirmed certain gifts of the father; he dismissed his appeal, and the sons agreed that Hetnarain should, after their father's death, divide the ancestral as well as other property between himself and Modnarain, in the proportion of 9 to 7 annas, the elder son taking the larger share. The Court acted on this instrument, dismissed the appeal, ordered the costs of the vakeels to be paid out of a moiety of the deposit, and the other moiety to be returned to the father, together with the stamp-money on the institution of the appeal. The partible nature of this estate, divisible in these proportions, stood, therefore, between these brothers on the footing of this compromise only. The instrument of compromise, though termed by Hetnarain one of partition, contained no express provision for a partition; but that power flowed from the relation of joint ownership in which they had agreed to stand.

After their father's death, the sons acquiesced in the instrument of compromise. It is immaterial to consider whether either could have disputed it, and whether anything had intermediately been done which entitled either, according to the Law as administered in the Courts of the East India Company, to recede from it. The disputes and litigation, which subsequently ensued, turned upon matters consistent with such acquiescence; each claimed the share of the estate which the compromise secured them, and these proportions had no other foundation.

The partition which took place, and which the suit of the appellant seeks wholly to annul and set aside, was, in consequence of fresh disputes between the brothers, arising from their unfriendly feeling to each other, and their mixed enjoyment of the estate under such estrangement, suggested by Mr. Ravenshaw, the Revenue Commissioner for the district, where the property was situate. It was a measure substantially in furtherance of the instrument of compromise. From the evidence of the respectable and wholly unimpeached witnesses who took part in the preparation of the partition deed under the direction of the Commissioner, and, to some extent, under his own superintendence, it appears to their Lordships that the partition was prepared and settled with care and deliberation, without haste or precipitancy, and was executed by the brothers openly and publicly, without restraint or coercion, and with full opportunity for enquiry, and on the part of both, with presumable competent knowledge, a presumption which is not rebutted.

The plaintiff, in excuse of his own apparent negligence, supposing his case to be as he states it, alleges that he was sick at the time, and incapable of attending to business; but his own temporary incapacity would not have extended to his competent agents and assistants in the work; and his own witnesses do not represent him as wholly incapable of acting in matters of business during this time, but, on the contrary, as occasionally taking part in the transaction of them. The alleged haste and precipitancy of the settlement—another explanatory cause which he alleges as conducive to the success of the deceit which he alleges to have been practised against him—is also disproved, in their Lordships' opinion, by the evidence as to the *factum* of the deed; and the alleged force upon him, which is said by him to have proceeded from the Commissioner, is altogether without proof. That the wishes and influence of the Commissioner may have operated upon the mind of the appellant so as to induce him to join in the partition which the Commissioner applied himself to effect, is very probable; and that species of influence a dissatisfied party may readily transmute in his own mind into pressure and coercion. But their Lordships can find no evidence in the case of anything amounting to force or coercion of the appellant; and the letter of the Commissioner to the appellant, on which so much stress was laid by Mr. Roundell Palmer in his able reply, seems to their Lordships to bear really the meaning which the Counsel for the respondent gave to it. It contains matter of suggestion; and the allusion to the

10,000 rupees is an allusion to species of recognizance not unknown in similar transactions, whereby a landed proprietor engages for the peace and good order of his zemindary. If, then, there really were any gross inequality in the partition, and, as it is said, the 7-anna sharer really got in point of profit that which the 9-anna sharer should have received, so that their positions were in a manner inverted, their Lordships would in this case, under all the circumstances in proof of the participation in the transaction of the plaintiff's own competent agents, be unable to ascribe the failure to negligence or mistake.

Corruption of such agents would be the more probable solution. But the case is abandoned on the ground of fraud ; and the same weakness, indirectness, argumentativeness of the evidence, which displaces that ground of charge, applies equally, if not in greater degree, to the ground of mistake which can have no foundation if the inequality of value be not established. Now, if this inequality really existed to any such extent as would have vitiated the partition, it is difficult for their Lordships to conceive that stronger and direct proof of it could not have been given by the appellant. He must have known, and have had the means of proving his actual receipts soon after the partition ; the actual value was capable of direct proof, yet he offered none of that character.

The Courts in India are very particular in requiring the strictest proof when a deed prepared and executed as this has been, especially where it is one in furtherance of a compromise of suit, is sought to be set aside : a precaution which should never be relaxed there, where the spirit of litigation has so little check, and so much wider means of mischief than it has here. It appears, therefore, to their Lordships that the Courts below rightly dismissed the suit, and that it would be of dangerous consequence to allow deeds of this nature, to be impeached on evidence no stronger than that which this case presents. The view which their Lordships have taken of the evidence as to value, renders it unnecessary for them to express any opinion on the other parts of the case. They have no hesitation in recommending to Her Majesty to dismiss this appeal with costs.

The 8th July 1859.

Present :

Lords Kingsdown, Sir E. Ryan, Sir Cresswell Cresswell, Sir J. T. Coleridge, and Sir L. Peel.

Interest—Act XXXII of 1839 not applicable to Opium Wagers, but only to debts certain in time and amount—Court's discretion (whether open to Review or Appeal)—Evidence of Mercantile usage.

On Appeal from the Supreme Court of Bengal.

Juggomohun Ghose,

versus

Manick Chund and Koisree Chund.

Act XXXII of 1839 (authorising the allowance of, interest in certain cases) does not affect debts contingent in amount and time of becoming due—*e. g.*, a wager's contract for the payment of the excess over the average price of Opium at the next ensuing public Sale.

Quere.—Whether the discretion of the Court in allowing or refusing to allow interest in cases within the Act, is liable to review or appeal.

Proof of mercantile usage needs not either the antiquity, the uniformity, or the notoriety of custom, which, in respect of all these, becomes a local law. The usage may be still in course of growth ; it may require evidence for its support in each case ; but in the result it is enough, if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties in their contract.

THIS was an appeal from the Supreme Court of Judicature in Bengal. The plaintiff in his declaration stated that, in consideration that he had paid to the defendants the sum of 500 rupees, they had undertaken that, if the average price

per chest of Patna Opium at the next ensuing public sale rose above 1,300 rupees, they would pay him such excess or difference within a reasonable time after the said sale ; that the sale took place on the 7th December 1786 ; that the average price did exceed 1,300 rupees per chest, but that the defendants had not paid the difference.

At the trial the liability of the defendants to pay the principal sum demanded was not in dispute ; but the plaintiff also claimed to be allowed interest on that sum, and offered evidence for the purpose of showing that it was usual to pay interest in default of payment of the principal on similar contracts.

The defendants cross-examined the plaintiff's witnesses, and were prepared to offer evidence in opposition ; but the Court, being of opinion that the plaintiff's witnesses had failed in making out the usage, stopped the case, and gave a verdict for the principal sum only.

The plaintiff had also relied on the Legislative Act of 1839, Chap. XXXII, and the Court were against him on this point also, but gave him leave to move to increase the verdict by the amount of interest at the rate of 6l. per cent if he could satisfy the Court that he was entitled to interest under the provisions of the Act.

The plaintiff accordingly moved for a new trial on the first point, and to increase the damages at the rate above specified on the second. After argument the rule was discharged on both points, and both have now been argued before us on appeal against that judgment.

The Legislative Act XXXII of 1839 was framed, as appears on the face of it, expressly in order to extend to Bengal the provisions of 3 & 4 Wm. IV, cap. 42, Sec. 28, and substantially adopts the language of it. It enacts that "upon all debts or sums certain, payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

Two questions arise upon the construction of this enactment: *first*, what is meant by a sum certain and a time certain? the *second*, assuming the case to have arisen, which gives the Court jurisdiction to allow interest, whether the exercise of that jurisdiction, or the refusal to exercise it, is subject, in any way, to review?

With respect both to amount and time of payment, it was argued that the maxim "*id certum est quod certum reddi potest*" must be applied ; and, in a reasonable sense, this is true. In the simplest case we may be obliged to have recourse to calculation for the actual amount, or to the calendar for the precise day of payment. A promise to pay on the last Saturday of the year, at the rate of 15s. a week for twelve months, would certainly be a promise to pay a sum certain at a time certain. It was argued also that, in respect of both time and amount, it was a question of degree, and in the same reasonable sense that every Statute is to be construed, not captiously, but with a view to the expressed intention of the Legislature, this is true also. But these positions do not remove the greater difficulty of determining at what period of the transaction between the parties must the amount and time of payment become ascertained. It is necessary that these should be ascertained at the time the promise is made? or will it suffice if they become so at the time when it ought to have been fulfilled and is broken? Ascertainment at any later period certainly could not suffice.

The Statute, by the qualifications which it imposes of certainty in time and amount, by requiring that this certainty, and the obligation itself to pay the principal, should be created by written instrument, by making the interest run from the time at which the principal is payable, and, *finally*, by giving the Jury a discretion as to the allowance of interest, even where all these circumstances concur, seems to have been framed, not simply on the principle of compensation to the creditor, but also on that of penalty to the debtor for not paying punctually at a time when he

must have known the debt or sum, specific in amount, was to be paid. But for this consideration, there was no reason why all debts, without distinction, should not have been made to bear interest from the time when payable; no previous uncertainty of amount, or of time of payment, would have been material; nor should any distinction have been made between obligation by writing and by word of mouth; nor ought the Jury to have had any discretion, for in all cases the need of compensation to the creditor may be assumed to have been the same. But, if the conduct of the debtor be taken into account, then the uncertainty of amount, and the contingency as to time of payment, and that there is no writing, are all more or less material—obviously the most honest and punctual debtor may be unprepared to pay an uncertain amount, which may not be due for months, or years, or only on the happening of a contingency, the falling in of which he may not know of. On this principle, too, the discretion given to the Jury to consider all the circumstances of each particular case become perfectly reasonable. It is quite consistent with this view that, where the debt is payable “otherwise” than at a certain time, interest is not to be allowed except from and after the time of a written demand of payment. This reasoning leads their Lordships to conclude that the certainty required must exist at the time when the promise is made, and, therefore, that the Statute does not in this part affect debts contingent in amount, and time of becoming due—a construction strictly conformable to the natural meaning of the language used.

This reasoning applies very strongly to the case now before us, in which there is no promise absolutely to pay any sum, certain or uncertain, nor any time limited for the payment, but only a promise contingent on events which may never happen, to pay a sum capable of ascertainment only and if when these shall happen, and the time for the happening of which, if they ever do happen, may be indefinitely postponed. Such are the facts here. If, at the next ensuing public sale, the average price per chest of Patna Opium should rise above 1,300 rupees, the defendants promise to pay the difference between 1,300 rupees and such average price. That any such difference would ever exist, was quite uncertain; in the expectation of the defendants, of course, it was considered extremely improbable. If there should be any difference, what it would amount to was equally uncertain; and when the public sale would take place, which was the time for ascertainment, was also unknown. Now, there seems to be an insuperable difficulty in bringing such a state of facts within any but the most forced construction of the words of the Act. The Act supposes a party to have been sued for breach of a contract for the payment, by virtue of a written instrument, of a sum certain at a certain time. But how can it be said that, in the contemplation of either party, any such contract ever was made.

As their Lordships think that the plaintiff failed in bringing the case within the Legislative Act, and, therefore, agree with the Court below in their decision, it is not necessary, for the decision of the case, to express any opinion on the second general question, whether the discretion of the Court in allowing or refusing to allow interest, in cases within the Act, is liable to review or appeal. Several cases were cited in the argument, in which Courts had refused to interfere with the discretion of the Jury, under the Statute of Wm. IV, on the ground that the Legislature had left it entirely to them; but none in which the Court had so declined, at the same time stating that it disagreed with the Jury's determination. We do not, therefore, think the authorities conclusive. We should undoubtedly be slow to interfere in any case before us in respect of any matter specifically within the power of the Jury, as, for example, the amount of damages; but dealing, as we have to deal, with questions of fact as well as law, we are not prepared to say that, in a case either of allowance or refusal, in which we were clear that the Court below, acting either through prejudice or misunderstanding, had committed injustice, we should not feel bound to recommend to Her Majesty that an opportunity should be afforded of re-considering the matter in a new trial.

It remains now to consider the other ground on which the plaintiff relied : the evidence of mercantile usage. To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth ; it may require evidence for its support in each case ; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.

We have examined the evidence before us by the light of this principle, it is certainly not conclusive ; it is open to criticism ; it may require and admit of explanation ; but, such as it is, we think it required an answer, and the more so after the language of their Lordships in the judgment delivered here on appeal, in the case from Bombay, to be found in 5 Moore, 136, evidence which was, of course, well known and relied on by the plaintiff in preparing his for trial. It would, moreover, be much to be lamented that a difference so important should prevail between the two Presidencies in the administration of justice.

This conclusion will make it proper for their Lordships to recommend to Her Majesty that this appeal be allowed, and the case be remitted to India for a new trial, if the parties should not come to some arrangement, and their Lordships will direct that the appellant have his costs of this appeal.

The 20th July 1859.

Present :

Lord Kingsdown, T. Erskine, Dean of the Arches, Sir E. Ryan, and Sir L. Peel.

Arbitration—Onus probandi (Averment of improper consent)—Privy Council (Practice of).

On Appeal from the Sudder Dewanny Adawlut of Madras.

Ranee Purvatha Vurdhay Nauchiar, Ranee and Zemindar of Ramnad,

versus

Jayaverá Ramakomara Ettypa Naicker, Zemindar of Yettiapooram.

Where it is averred that the consent of one of the parties to an arbitration was obtained by threats, and through undue influence exerted by persons in authority, the *onus probandi* is on the person making the averment.

In the examination of such questions, the Privy Council will look to the broad principles of justice and equity, and discourage mere technical objections not affecting the merits of the case, and more especially discountenance the invention of new grounds of dispute which have occurred in the course of the litigation, and which were not even mentioned at the commencement of it as the cause for promoting the suit.

THE parties to the present litigation are the Ranee and Zemindar of Ramnad, the appellant, and the Zemindar of Yettiapooram the respondent. They are the owners of two zemindaries in the vicinity of each other, and the primary question was one of boundary : whether certain disputed lands belonged to the one zemindary or the other ?

A very long litigation ensued, in the course of which several decrees were pronounced by the Courts below ; but the important decrees with which we have to deal, are a decree dated the 3rd of May 1841, and a decree bearing date the 28th of April 1853. Both these decrees have been appealed from : the decree of May 1841 by special leave from Her Majesty.

On the 23rd of August 1834, Mr. Blackburn, the Collector of Madura, within whose Collectorship Ramnad was situate, made an award whereby he decreed that all the lands, in dispute, amounting to 4,016 coorookums belonged to the zemindary of Ramnad.

By the decree of the 3rd May 1841, the Sudder affirmed the order of Mr. Elliot, dated 11th November 1839, setting aside this award.

As this award and decree embraced the whole property in dispute, it was perfectly obvious that the first consideration was, whether the decree of May 1841 was well founded or not; or, in other words, whether the award was to be deemed valid or not? If the award was valid, all subsequent proceedings necessarily fall to the ground. Their Lordships, therefore, determined, in the first instance, to confine the argument to that question, and to dispose of it.

For the purpose of duly considering the decree of May 1841, and the validity of the award, it will be necessary to take a short view of the circumstances which gave rise to the dispute between the parties, and which led to the making of that award. It may be that, if any doubt arises as to the meaning of any of the written instruments, their meaning may be more satisfactorily ascertained by reference to the preceding and the surrounding circumstances.

It can hardly be necessary for the purpose we have now in view, to take into consideration anything which occurred after the decree of May 1841, for such circumstances can scarcely have even a remote reference to the award itself, or to that decree.

It appears that at an early period, whether in 1813 or not matters little, disputes had arisen respecting the boundaries of the zemindaries and the lands in question. In January 1823 a native *punchayet* was convened, with a view to settling the question in dispute. They failed to make any arrangement, and the ordeal prescribed by Indian custom was not carried into effect.

Thus things remained till April 1833. It is useless to attempt to ascertain the reason why the question remained so stationary. At the time last mentioned, the zemindar of Yettiapooram petitions the Board of Revenue to give effect to this native *punchayet*, and we think, looking at the nature of the ordeal, it is not surprising that the Board refused its consent.

The dissensions respecting these lands, however, not only continued, but led to broils and bloodshed, so that it became the duty of the Government to interfere. The Government did interfere accordingly, by letter addressed to the Board of Revenue, dated 12th July 1833. That document, as far at least as we are able to ascertain, is contained in an extract from the proceedings of the Sudder Adawlut, under date the 3rd of May 1841; and there it is stated, "It is, moreover, shown by the above proceedings that, on the 12th July 1833, Government, in a letter addressed to the Board of Revenue, particularly ordered that, in the event of the matter being referred to the arbitration of either of the Collectors of Madura or Tinnevely, the principals should be required to enter into a bond, binding themselves to abide by the decision; and further declared "the Collector himself not competent to decide the case, except on the mutual consent in writing of the litigating parties." That is all, we believe, that can be found of the precise contents of this very important instrument. It is also, we should observe, however, set forth, to a certain extent, in a petition which is to be found at page 19 of these proceedings, line 27. It is rather in different terms, but it is to the same effect. The disputed land was at that time under attachment.

Now, all these facts and circumstances must have been known to both parties. The subject in dispute, the vain attempt to settle by the native *punchayet*, the interference of Government by attachment, and, unless the Collector was wholly regardless of the positive orders of this Government, the parties must have been apprized that no settlement by arbitration could take place without their consent.

We must now inquire what took place between the Collector of Tinnevely and the parties to this suit, or rather between the Collector and the zemindar of Yettiapooram, for, no doubt, the zemindar of Ramnad gave his consent to the arbitration in adequate terms, and was bound by such consent.

So far as appears, it is probable there were some previous communications; but the first written communication now appearing from Mr. Eden, the Collector of

Tinnevely, was written on the 30th of June 1834, and it will be found at page 55, No. 105. The letter is to the following effect:—

“As I have to ask you certain questions regarding the dispute of the boundaries of the village Mauvliyoodi, belonging to your zemindary, and of the village Peroonauli attached to the zemindary of Ramanadapooram, you are hereby required to constitute a vakeel (attorney) in whom you have confidence, and re-employ him to appear on your behalf before me with your mookhtearnamah (power of attorney).”

Perhaps there was some ambiguity in his letter, but to ascertain exactly what passed, we must look at the whole. The ambiguity arises from there being no mention of arbitration in express terms. The requirement of a vakeel was according to usage, and the power of attorney, if not required by the orders of Government, was a proper precaution.

What occurred immediately after the receipt of this letter of the 20th of June we do not accurately know, but it appears that an order was issued by the Collector, or a letter written by him, dated July the 4th; unfortunately, again, we only know the contents of that letter from the petition of the zemindar, dated the 9th of July 1834, which is to be found at page 267, No. 280. Now, making due allowances for translation and eastern modes of expression, this petition, or letter, gives the clearest evidence of the course of the transaction. It shows what the zemindar understood, and what he purposed to do. It recites the substance, as we conceive, of the order of July the 4th, namely, that he was to send a vakeel with power of attorney, not merely to answer questions as to the boundary, but to admit proposals for the settlement of the dispute, and he states that he sends the vakeel accordingly. That is the substance of that letter, and it is thus recited in the petition:—

“In obedience to your order, dated the 4th of July, directing me to send my authorized vakeel with a mookhtearnamah to answer in person certain questions put to him regarding the boundary dispute between the village of Mauveloday, attached to my zemindary and that of Paroonalee, attached to the zemindary of Ramanadapooram, and to admit any proposal which might be made for the settlement of the said dispute.”

Looking at all the circumstances, it does not appear to us that any real doubt can arise as to the meaning of this letter. There is no real ambiguity in the expression “proposal for a settlement.” To consent to a mode of arrangement is to consent to an arrangement of the matter in dispute in a particular mode. It would really be absurd to say, I consent to any mode of arrangement you please to point out, but I will not be bound by what is done under it. If there were a shadow of doubt, which we do not think there is, the conclusion to this letter would remove it. The conclusion is to be found at page 268, and it is in these words: “Therefore I request your Honor will be pleased to enquire into my case, and pass a just decision.”

The next step in this case is the mookhtearnamah, or power of attorney, which, though apparently dated on the 9th of June, in this part of the proceedings, is manifestly of the date of July the 9th, the date of the petition, part of which has just been read. This document is No. 279, at page 267, and it is to be read, if it be obscure at all, in conjunction with the petition No. 280 on the same page, stating that the vakeel was appointed for the settlement of the case. The mookhtearnamah states: “A boundary dispute having arisen between the village of Mauveloday, attached to my zemindary, and that of Paroonalee, attached to the zemindary of Ramanadapooram; and, as I appoint you, my mookhtear vakeel, to attend the Hoozoor Cutcherry of Tinnevely, to answer all the questions put to you, and to admit any proposal which may be made for the settlement of the said dispute, I do hereby declare that I will abide by the arguments regarding the above-said dispute.

We are all of opinion that this power of attorney, though not framed with the precision which ought to be found in every legal instrument, still adequately expresses the intention of the grantor, making due allowance for the vagueness which is inherent in most Indian documents. It authorizes the vakeel by it appointed to act on behalf of the grantor for the settlement of these very disputes. Provided the vakeel was duly authorized by his principal, no doubt has been raised, nor could, we think, have been raised, that the deed of consent executed by him on the 10th of July was, to all intents and purposes, sufficient, unless the signature of the principal was indispensable.

The document now referred to is No. 281, at page 268:—"I do hereby consent to abide by the decision of the Collector of Madura, who will come to the disputed limits, examine the accounts and other documents which may be produced by both parties, and then settle the boundary dispute existing between the village of Boodalapooram attached to the zemindary of Ramanadapooram and the village of Mauveloday attached to the zemindary of Yettiapooram: I have, therefore, executed this deed of consent." It is signed by the vakeel, in the presence of the Acting Collector.

This deed of consent mentions a reference to the Collector of Madura. True it is that the correspondence had been carried on between the zemindar and the Collector, not of Madura, but of Tinnevely, within whose district Yettiapooram was situated: and it is possible that the zemindar might have expected that Mr. Eden, the Collector of that district, would personally have made the investigation. This might have been so; but this expectation is not of essence of the transaction. The consent asked was not to an investigation carried on by Mr. Eden personally, but to a settlement in a mode arranged by him, and this was done.

The deed of consent was signed on the 10th of July. On the 11th Mr. Eden writes to the zemindar this letter, which is to be found at page 268, No. 282:—

"Your authorized vakeel, Coomaretoo Pillay, arrived here, and delivered me your *urzee*, dated the 9th instant, purporting that you have executed to him a mookhtearnamah, empowering him to admit any proposal which might be made for the settlement of the boundary dispute between the village of Mauveloday attached to your zemindary, and that of Paroonalee attached to the zemindary of Ramanadapooram, without raising any objections that he must again consult with you on the subject. When I consulted with your vakeel on the subject of this boundary dispute being one of long standing, of the loss in consequence entailed on the ryots and others, of those which must be incurred hereafter, if the dispute be not settled, and also of the measures which should be adopted in arranging the matter, so that the people might enjoy peace, I perceived that it would be better for the parties to have the dispute decided by the Zillah Authorities, on consideration of the proofs adduced by both parties; moreover, it is also better for them to have their dispute settled by a single authority than to have to do with two; and it is further better for them to have it settled by the Principal Collector of Madura, who is well acquainted with the particulars of your case, because he was last year the Collector of this zillah; and, as he is also able to understand all the particulars of the opponents' (the inhabitants of Ramanadapooram) case, he is in consequence well acquainted with the whole particulars of this dispute. I have, therefore, determined that it will be better for you to have the dispute decided by the Principal Collector of Madura than by myself, and have obtained the consent of your vakeel, Coomaretoo Pillay, to the above-said proposal.

"I have communicated these particulars to the principal Collector, who will go to the disputed limits on a day fixed, in order to settle the boundary in dispute, and will instruct you to be present there on that date. You should go personally to the said spot on that date without failure, whatever business you may have, and produce before him the accounts, documents, and witnesses to establish your case, and await his decision. If you fail to do so you can expect no redress."

This letter is a translation, which may account for some of the expressions, for it could hardly have been so written in the original. It is a document of very considerable importance, as affecting the present question. It states the arrival of the vakeel, Mr. Eden's consultation with him, the determination, on consideration of all the circumstances, to refer the settlement to the Collector of Madura, as best acquainted with the facts, the consent of the vakeel thereto, and calls upon the zemindar to attend the investigation.

Here was ample notice to the zemindar of what had been arranged; and this was the time to have remonstrated against the proposed settlement, if it appeared to the zemindar to be unjust, or if his vakeel had exceeded the powers with which he had been entrusted.

It does not appear that any remonstrance was made, or any dissatisfaction expressed; and surely, when such opportunity offered, this is stringent proof that the arrangement was consonant with the original intention of the zemindar, and was not deemed by him prejudicial to his interests. But if any doubt could possibly be said to have existed upon any of these questions, the subsequent history of the transaction will assist us in coming to a just conclusion.

Proceeding in order of time, the next document in date is from the Collector of Madura to this zemindar, dated July 14th, 1834. It is the document No. 284, and is to be found at page 269:—

"The Collector of Tinnevely having informed me, through a letter giving cover to the deed of consent executed by you, agreeing to have the boundary dispute between the village of Mauveloday attached to your zemindary, and that of Paroonalee, attached to the zemindary of Ramanadapooram, decided by me, as also the other documents, I will come, on the 25th instant, to the disputed limits to settle the dispute; consequently you should come on the morning of the above-said date to the spot in question, with the accounts and other documents connected with the case."

By this letter Mr. Blackburn, the Collector of the Madura district, gives to the zemindar notice of an intended meeting, for the investigation and settlement, reciting the consent given by the vakeel to have the dispute settled by him, the Collector.

This document was forwarded to the zemindar in a despatch from Mr. Eden, dated July the 17th, and is to be found also at page 269, No. 283:—

"Mr. Blackburn, the Principal Collector of Madura, has transmitted through me an *Enayetnamah* to your address, which is herein enclosed, stating that he will, on Friday, the 25th instant, proceed to the village of Paroonalee, to settle the boundary dispute between the village of Mauveloday, attached to your zemindary, and that of Boodalapooram, attached to the zemindary of Ramanadapooram. As the Collector will go to the disputed lands and settle the dispute, and as I have ordered Veerabudderapullay, the acting Naib Sheristadar of this Collectorate, to go to the spot on the same date, that he may explain to the Collector all the circumstances regarding your case, I think the whole matter will be justly decided, and you may consult with the said Veerabudderapullay regarding the said dispute as you may think proper. I think it is also better for you to send your authorized vakeel, who is well acquainted with the matter of this dispute since the time of its commencement, with mookhtearnamah, to the effect that he may speak everything on your behalf, and cause documents and witnesses to be produced before the Collector. Therefore you should act accordingly." This appears also to have been an extract, and the substance, of it is to give the zemindar notice to attend the Collector of Madura by his vakeel.

Here again, upon the receipt of this despatch of the 17th July from Mr. Eden, ~~was an opportunity~~ for the zemindar to pause, and make any representation that he ~~deemed proper~~. Let us see what he actually did say on the receipt of those documents. It will be found at page 269, No. 285, and is a letter to Mr. Eden, dated

July the 19th. He recites in substance what had occurred and says, "the case will doubtless be decided justly."

We believe that we have now reviewed all the important evidence bearing upon the question of the consent of the zemindar to the investigation of the case by the Collector of Madura, and the settlement by him.

The next step towards ascertaining the validity of the award, would be to consider how the Collector of Madura fulfilled the duties he had undertaken ; but, before saying a word as to that part of the case, which has scarcely, if at all, been the subject of this discussion, we will dispose altogether of the question of consent, to which the main argument on behalf of the respondents has been addressed.

It has been said that, if the zemindar did give his consent to the arbitration, it was not a willing consent, but was obtained by threats, and through undue influence exerted by persons in authority. Now, the *onus probandi* of an averment of this description must necessarily fall on those who make it. Where is the evidence ?

True it is that the proposal originates with the Government, who are anxious to put an end to dissensions occasioning riot and bloodshed ; but what are the instructions issued by the Government to which I have already referred ? They are, that the consent of the parties is indispensable to such a proceeding by arbitration. Consent means a willing consent, not a forced consent, which would be a mere mockery ; and so the Collectors must have understood the order. If they used either fraud or force, they disobeyed the Government, and were guilty of a breach of duty. Then we say, where is the evidence ? We cannot presume such gross misconduct.

Now, in searching for evidence on this head, there was but one expression in one of the letters which was prominently brought to our notice, and that is an expression in No. 282, page 288, and is to the following effect:—"If you fail to do so" (that is, to attend the Collector of Madura for the purpose of settlement) "you can expect no redress."

Upon this we observe : *first*, that this letter was written after the consent had been given, and, therefore, could not affect it ; *secondly*, that it related not to the consent itself, but to the production of evidence to the arbitrator ; *thirdly*, that the zemindar had previously made application to the Government on this subject, and had prayed for the execution of the *punchayet* of 1823 ; and this expression evidently meant : If you will not avail yourself of this opportunity, you can expect no assistance from the Government.

That the Collectors were anxious to fulfil the wishes of the Government, and obtain a settlement of these disputes by arbitration, cannot be doubted, and it may be assumed (though there is no evidence on that point), that they used the influence of their position for that purpose ; but their doing so, amounted neither to fraud nor coercion. A representation of the mischiefs which resulted from the existing disputes, and the difficulty of a settlement in the ordinary mode, in order to induce the consent of the zemindar to a termination of the disputes by reference to a Government officer, well acquainted with the local circumstances, is perfectly consistent with justice and equity, and manifestly most beneficial to the parties concerned. Indeed, the documents and evidence, when litigation did commence, present a melancholy contrast to the proceedings which were taken by Mr. Blackburn.

Their Lordships are of opinion that there is no evidence to substantiate the charge of the consent of the zemindar having been obtained by fraud, undue influence, or coercion. Wherever a strong expression is to be found, it is for the purpose of inducing the zemindar to follow up his own consent, which had already been given, and to produce the evidence necessary to establish his claim and protect his own interests. If there had been any evidence that the consent had been obtained under coercion, or by undue influence, we must observe that, in the subsequent proceedings, the zemindar had most ample opportunity, over and over again, to have produced before the Court evidence to establish such a charge, but he never attempted to do so. He never made such a charge in his original plaint, filed in 1836.

One other objection remains to be considered. It was insisted that the zemindar was not aware of the finality of the proceedings. It is somewhat difficult to discover how to consider this objection, for we do not find that it is supported by anything that the zemindar said or did at the time. What is there in the nature of an arbitration which gives rise to an apprehension that it should not be final? True it is, that, if compared with the proceedings in the Courts of the Company, an arbitration cannot pretend to vie with them in the abundance of intermediate proceedings, the number of decrees, appeals, and reviews: but the very object of acceding to an arbitration was to adopt an alternative by which the question in dispute might be settled, and recourse to the Civil Courts avoided. The zemindar could hardly expect that an arbitration would be attended with similar dilatory processes, even if he were enamoured of them, which we can hardly presume.

But then the ingenuity of Counsel has suggested, that by analogy to a *punchayet* under the Regulation, the arbitration might be subject to appeal.

Now, looking at that Regulation, we apprehend that appeal from a Regulation *punchayet* could take place only where there was a flagrant violation of the first principles of justice; and, if a similar disregard of those principles had existed in the present case, we cannot doubt that a Court of Justice might set aside the award. We cannot, however, discover any indisposition in any of the Judges, through whose cognizance this case has since passed, to set aside an award, even upon the slightest pretences. There is nothing, therefore, in these proceedings to sustain this objection.

The next stage would be the execution of the duties of the arbitrator, which will occupy us but a very few moments, for it has not been contended that Mr. Blackburn was guilty either of partiality or negligence. He appears to have taken every means in his power, by the examination of the land in dispute; and, by a consideration of all the evidence, oral and documentary, which was brought before him, to arrive at a just conclusion.

It is meet, however, to apply our attention, before we proceed further, to the reasons assigned by the Court of Sudder Adawlut for their decision on the 3rd of May 1841. They state that they agree with the Zillah Judge of Madura in setting aside the award, because the Collector did not obtain an agreement in writing from the zemindar himself, binding himself to abide by the award. So that they were of opinion that a consent in writing signed by the vakeel, who had been duly authorized by a power of attorney executed by the zemindar himself, was not a sufficient authority. They cite no law, no custom, and no principle for this conclusion. It is, we believe, notorious that persons in the position of this zemindar were in the habit of transacting business through their vakeels, so that there does not appear anything unusual in the consent being given by a vakeel. And in the absence of all positive law to the contrary, we are of opinion that the zemindar was just as competent to bind himself by a duly authorized agent, as he was to sign the consent with his own hand: and that he did give the authority to the vakeel is not disputed. We think, therefore, that this objection to the award cannot be maintained.

Some notice is taken of the absence of a bond to abide the decision. Now, assuming that the Government (for we have merely an extract) did direct this to be done, and that they did not mean a written agreement only, how does the absence of a bond affect this case? Why, simply that, by means of a bond, there might be an easier mode of enforcing the award.

In the examination of questions like these, their Lordships are of opinion that it is their duty to look to the broad principles of justice and equity; and, whilst they are always willing to pay due deference to the Regulations which in part constitute the Law of India, to discourage in proceedings of this description mere technical objections which affect not the merits of the case, and more especially to discountenance the invention of new grounds of dispute which have occurred in the course of the litigation, and which were not even mentioned at the commencement of it, as the cause for promoting the suit.

We think that it is satisfactorily proved that the zemindar gave, in adequate term, and in a sufficiently formal manner, his assent to the decision by arbitration; that during the whole proceedings he never retracted nor expressed dissatisfaction with the arbitration (indeed, it is stated that he was sometimes personally present); and we deem it contrary to all justice that if he entertained the objections now urged, he did not declare them at the proper time, but allowed the investigation to proceed, prepared to take advantage if the result was in his favor, and to dispute the arbitration if the decision was against him.

We shall humbly advise Her Majesty that the award of August 1834 is valid, and ought to be sustained, and that the decree of the Sudder Adawlut, of the 3rd of May 1841, ought to be reversed, together with all other decrees that may be inconsistent with the maintenance of the award. And we shall further advise Her Majesty that the respondent should be condemned in all the costs incurred in this litigation.

The 27th July 1859.

Present :

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, and Sir L. Peel.

Mortgage (Bye-bil-wafa or Kut kubala)—Foreclosure—Limitation—Tender of Mortgage-money.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Prannath Chowdry,

versus

Rumrutton Roy and others.

Bye-bil-wafas or kut kubalas are redeemable like ordinary mortgages, and subject to foreclosure.

It cannot be laid down, as a rule universally true, that under Section 14 Regulation III. 1793, a mortgagee's proceeding for a foreclosure under a mortgage of the class of bye-bil-wafa simply cannot be preferred after 12 years from the expiration of which the conditional sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations, those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the laches of the demandant or of others before him.

When a mortgagee not only seeks assistance of a Court to give him possession of his pledge, but also to foreclose the mortgage, he must effect that object in the mode prescribed by Section 14 Regulation III. 1795, Section 3 Regulation II. 1805, and Section 8 Regulation XVII. 1806.

Mere words in the form of a protest which may accompany a tender will not defeat it, where they can reasonably be regarded as idle words. But the payment into Court of the mortgage-money, accompanied by a petition disputing the validity of the mortgagee's title to foreclose, and expressing an intention amounting to a notice to sue the mortgagee to recover back the very money tendered, is not a valid tender.

THIS is an appeal from a decision of the Sudder Dewanny Adawlut at Calcutta in favor of the respondent, a defendant in a suit wherein Baboo Prannath Chowdry was the plaintiff, and Sree Motee Rookea Begum, heiress of Beebee Noor Jeehan, Syed Amanally, and Ramrutton Roy, were the defendants.

The suit, originally instituted in the Court of the Principal Sudder Ameen of the 24-Pergunnahs, and thence transferred to the Civil Court there, was brought to recover possession of a house and land, under a foreclosure of a mortgage of the same to the plaintiff, executed by Beebee Noor Jeehan and her husband Meer Sydoo. The property mortgaged belonged to the wife alone. The title of the mortgagor, Beebee Noor Jeehan, to the property which was the subject of the suit, was undisputed in this cause. The mortgage, which was of the class termed *bye-bil-wafa*, or *kut kubala*, was effected by a deed of conditional sale for 4,001 Sicca rupees, with a further charge, under a second deed of the same nature, for 1,000 Sicca rupees. The first deed bore date 11th Chyet 1231, and the second was dated 23rd Bysack 1232.

The plaintiff contended that a foreclosure of the title to redeem had duly taken place, and, on that foreclosure, he sued for possession to perfect in himself the proprietary right to the lands free from redemption. Ramrutton Roy was the only

one of the defendants who disputed the claim. He contended, amongst other things, that the claim to possession of the lands was barred by limitation of suit, and the right to foreclose defeated by a due deposit of the mortgage-money under the Regulations hereinafter referred to. The plaintiff had, as the respondent contended, wrongly refused to accept the money, and was, therefore, not entitled to foreclosure. He further contended that, by a deed of sale from the representatives of the mortgagor, the plaintiff's former *kut kubala*, or deed of mortgage, had been rendered void.

The first, second, and third points to be determined were stated by the Judge as follows. As, on the remaining points, three in number, he passed no decision, it is unnecessary to state them.

"*First point.*—Whether or not limitation can apply, if the foreclosure has been effected after the lapse of twelve years from the period fixed for re-payment of the amount of plaintiff's alleged deed of conditional sale?

"*Second.*—Whether the foreclosure in question has taken place in due course or not; whether in the foreclosure case, the amount due under the conditional deed of sale was paid by the defendant, under protest or not; and whether the said defendant had any right to deposit the said amount or not?

"*Third.*—When another deed of sale, referring to the said two deeds of conditional sale, and in lieu of the amounts specified therein, has been executed, which said deed of sale has been set aside as invalid by the Court, then, has plaintiff or has he not again a right to sue under those two conditional deeds of sale?"

The Judge of the Civil Court of the 24-Pergunnahs decided the first issue in favor of the plaintiff, the appellant; the second and third issues he decided in favor of the respondent; and the remaining issues he judged it unnecessary to decide in consequence of his decision on the second and third issues in the respondent's favor. He dismissed the plaintiff's suit with costs.

On appeal by the plaintiff from that decision to the Sudder Dewanny Adawlut, that Court, not unanimously however, reversed the finding on the first issue, and in effect decided that the plaintiff's suit was barred by limitation.

The defendant Ramrutton had not appealed from the decision of the Lower Court on the issue as to the limitation of the suit; and it was contended before their Lordships that the Appeal Court had not authority to reverse the decision of the Court below on that issue; but their Lordships think that the appeal of the plaintiff brought the whole cause before the Court of Sudder Dewanny Adawlut, and that Ramrutton, who had the decision in his favor, was not bound to appeal from a finding unfavorable to him on a single issue.

The instrument of conditional sale in this case was described as one of mortgage on the face of the instrument itself. It was in the ordinary form of a *bye-bil-wafa* or *kut kubala*. It contained a stipulation against a sale or mortgage to any body else by the mortgagor, and fixed, for payment of the money, a time certain, on the day after which, if the property were not redeemed, the sale of the lands was to become absolute. As this time had elapsed more than twelve years before the institution of the foreclosure proceeding, it was contended, on behalf of the respondent, that the claim was barred under the rules of limitation contained in Regulation II. of 1793, Section 14, and Regulation II. of 1805, Section 3, and the Court of Appeal, reversing on this point the ruling of the Court below, so decided. After the execution of the mortgage, the mortgagor, Beebee Noor Jeehan, under an instrument in writing, appointed the defendant Ramrutton, her attorney, to manage her affairs, and put him, as such, into possession of the property in question for himself. She thereby agreed to pay him a considerable sum for his remuneration for such service; he was to pay certain debts which the instrument recites, including the appellant's mortgage, which is expressly referred to, and acknowledged therein, and an option was given to the defendant to purchase the property if he should be

The defendant alleges that he purchased the property accordingly. In the former litigation hereinafter referred to, he went into proof on this point, but he has not proved that purchase in this suit.

The sixth issue related to that transaction.

After the death of the mortgagor, disputes arose as to the property, and the defendant Ramrutton was continued in possession under a sentence of the Magistrate, in a foudarry proceeding for quieting the possession, who left the parties to proceed by regular suit for the decision of their rights.

A long litigation ensued between certain parties claiming the lands under alleged gift from the husband of the mortgagor, Beebee Jeehan, and claiming also by heirship; and Ramrutton, who claimed under alleged sale to him by Beebee Noor Jeehan. In that suit the appellant intervened, according to the practice of the Mofussil Courts, for the protection of his interests. He went into evidence to prove his mortgage title; and the decrees, which were made, from time to time, in the Courts in India in the progress of this litigation, were expressed to be without prejudice to his claims as mortgagee.

The effect of this intervention, on the question as to the limitation of his title to foreclosure, and to acquire possession of the property pledged to him, will be subsequently considered.

Finally, by a decision in the Privy Council, the suit of those plaintiffs against Ramrutton Roy was dismissed. The decision in the Privy Council was made without prejudice to the right of any person claiming under Beebee Jeehan, and on the meaning of that reservation, and as to its effect on the alleged title of defendant Ramrutton under the sale which he had set up, some discussion took place in the progress of the arguments in this case. Their Lordships, however, deem it unnecessary to express any opinion on this point, which is one not necessary to the decision of this appeal.

The questions to be considered are whether the appellant, mortgagee, was barred by limitation from proceeding to foreclose the parties entitled to redeem him, and, if he were not so barred, whether he proceeded so as to foreclose such parties; and lastly, the effect of such foreclosure on the suit which he instituted for possession. By Regulation III. of 1793, a suit is barred "where the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it; unless the plaintiff can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period in the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that either from minority or other good and sufficient cause he had been precluded from obtaining redress."

In considering the effect of a Legislative bar on the suit of a plaintiff, created as it is here by general words, it is often important to regard the nature and object of the suit: the nature of the title to which the bar is set up; who the parties are who raise the objection, and against whom it is raised. The bar from a twelve years' possession under these Regulations does not depend simply on the length of possession, it may exist in favor of one occupant and not of another; it may be powerful against one demand or one sort of claim, and be, at the same time, inoperative as against others. The time may run from a date prior or subsequent to the plaintiff's title to possession. A "cause of action" is not prolonged by mere transfer of the title. It cannot be laid down, therefore, as a rule universally true that, under Regulation III. of 1793, Section 14, a mortgagee's proceeding for a foreclosure under a mortgage of the class of *bye-bil-wafa* simply, cannot be preferred after twelve years from the expiration of the time which the instrument fixes as the period of redemption by payment, and on the expiration of which the

conditional sale will become absolute, for this indiscriminating ground of decision would include alike adverse occupations, and those which had not the semblance even of such a character, and would establish a bar arising from simple occupation, and not from the laches of the demandant or of others before him. The contention, on the part of the respondent, indeed, was not pushed to that extent, and it was conceded that a possession continuing under, and in privity with, and with acknowledgment of the claimant's title, would not operate as a bar, as, for instance, in the case of a trust, and the ordinary possession of a *cestui que* trust, or trustee under it. These instruments of conditional sale have now an operation different from that which they originally had. They are mortgages now, redeemable like ordinary mortgages and subject to foreclosure. There is some danger of falling into error in decisions as to the limitation of suits founded on them, if their old, rather than their present, character be regarded. As long as the transaction was one of sale, conditional at first, and absolute at a certain period afterwards by lapse of time, unless, on the prior performance of a certain condition, the title to the land was on that condition terminating in favor of the conditional purchaser, the same as that of any ordinary owner, and a possession *prima facie* irreconcilable with it, might well be deemed adverse from the date of the completion of the perfect title in the buyer.

But, if the transaction be viewed as it should now be regarded under the Regulations, as one of mortgage redeemable at any time by the mortgagor, or those claiming under him, in privity with his title as mortgagor, then, as no difference between the law prevalent in India and the law prevalent here, as to the relation between mortgagor and mortgagee on this point, has been suggested to their Lordships, the possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must, *prima facie* at least, be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here, that it should be accompanied by an actual continuing possession of the lands. The pledgee may, from various causes be, reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality.

In addition to this, it is to be observed that, as under the Regulations an adverse title must also be a *bona fide* title, under the shorter period of limitation; and as neither mortgagor nor mortgagee can, in ordinary cases, be unconscious of the conditional nature of their own titles, there is no ground for presuming generally between the immediate parties an adverse title from mere length of possession. Where a mortgage is subject by law to be foreclosed, the title to foreclose is in the nature of a limit to the title to redeem. It by no means follows, as a consequence, that the mortgagee foreclosing will be able, in a suit for possession to make good against all occupants a title to possession. Foreclosure is a step towards that object, under the law relating to these securities, where the object is to obtain a proprietary right; but in the mortgagee's suit for possession, consequent on the foreclosure notice, the plaintiff may, according to the character of the defendant, be met and defeated by proof of a prior, or of a superior title, or by proof of want of title in himself, or that he has not perfected his title to possession. But such defences are not open alike to all defendants, and between mortgagee and mortgagor some of them would be inadmissible.

Their Lordships can find in this case no evidence, and nothing to support an inference that the once undoubted right of the mortgagee to enforce possession was at an end, or barred, or incomplete. His intervention in the litigation before alluded to, his proofs and proceedings in that litigation; the decrees in relation to his title; the objection made to it by Ramrutton, on the untenable ground that his mortgage title was merged, as it were, in a conditional purchase which never took effect, afford the strongest proof that no payment or other act had extinguished his lien on the

lands hypothecated to him. The defendant, Ramrutton, if he became a purchaser, as he has alleged, took with notice of the mortgagee's title, which in terms forbade any subsequent sale.

A mitigation of this restrictive condition appears to have been established by a series of decisions in the Company's Courts, which limit it to sales or mortgages not made subject to the prior mortgage; so that, in the view most favorable to the defendant, the case stands thus: If this could be considered a *bond fide* possession at all, it must be taken to have been a possession originally not adverse to, but consistent with, the mortgage title. If such were its character there is nothing whatever to show that it became adverse at any time before twelve years preceding the institution of the appellant's foreclosure suit. The litigation before referred to was consistent with the recognition by both parties of the title of the mortgagee who intervened in that suit. It is stated by one of the Judges that both parties admitted the mortgage title. Whether this was so or not their Lordships have not in this suit the means before them of judging; but they find, certainly, no proof of a repudiation by Ramrutton Roy of the mortgage title at any period twelve years before the institution of the foreclosure proceeding and the notification under it. Had such a repudiation appeared, such repudiation, whilst it would have established from its date the commencement of adverse possessions, would at the same time, under the circumstances of this particular case, have established, in the opinion of their Lordships, from the same date, an absence of *bond fides* in Ramrutton as to the mortgagee's title; consequently their Lordships, in any way of viewing the question, are unable to concur in opinion with the majority of the Judges in the Sudder Court that the claim was barred by limitation as to time.

The intervention of the appellant in the suit, his proceedings in it, the recognition of his title in the decrees, all serve to show that the appellant was not sleeping upon his claims, and that he was deterred from enforcing them in a distinct suit of his own only by the circumstances of that litigation. He was certainly not precluded by any physical or legal impediment from the institution of a suit; but, as one of the litigant parties admitted his title, as the right of the respondent was still *sub judice*, as the title to redeem could be but in one of these parties, as he had been allowed to intervene and was a continuing party in that suit, their Lordships think that it would be an inconsistent course in the Courts to hold that he had been guilty of laches, and that the pendency of such a litigation, with the proceedings in it, furnished no "good and sufficient cause" for his not proceeding with his own claim in a distinct suit—a step which would have increased the cost of litigation to the parties who were only contesting *inter se* for the title which gave the right to redeem. The case, in this point of view, falls in with the principle of that decided in the Privy Council, and referred to in the appellant's case, p. 2. (Rajah Enayet Hossein, appellant, and Syed Ahmed Reza and another respondents).

The question remaining to be considered is, whether the foreclosure proceedings were regular. The mortgagee under this form of mortgage, unless he be put into possession of his pledge by the act of the mortgagor, must, according to the law prevalent in the Courts of the East India Company, under the regulations, seek the assistance of a Court to give him possession of his pledge. When his object is also to foreclose the mortgage, he must effect that object in the mode prescribed by the Regulations referred to in the case of the respondent, *viz.*, Regulation III. of 1793, Sec. 14; Regulation II. of 1805, Sec. 3; and Regulation XVII. of 1806, Secs. 7 and 8.

If this mode be not followed, the foreclosure will not be regular, and the mortgagee's title to possession will not be complete.

The objections which were raised at the Bar to this proceeding were, that the heir of the mortgagor was not duly served, and that the mortgagee had refused a valid tender of the money due to him under his mortgage.

With respect to the first objection, it appears to their Lordships, upon the evidence, to be sufficiently established for the purposes of this cause that Rookea Begum upon whom the notice was served, was the heir of Bebee Noor Jeehan.

The remaining objection relates to the payment into Court, in the nature of a tender, which was made by the defendant, Ramrutton Roy. Ramrutton Roy directed the money to be paid out to the appellant; but, at the same time, in his petition to the Court, he disputed the validity of the appellant's title to foreclose, and expressed an intention, amounting to a notice, to sue the appellant to recover back the very money which he was tendering.

The meaning of the direction that the money may be paid into Court clearly is, that the mortgagor may have adequate and lasting evidence of that which is put in place of a tender, and the mortgagee the security and advantage of a deposit in acknowledgment of the title.

The mortgagee would have little inducement to take the money, waiving his lien by its acceptance, if litigation on the very same subject were to recommence upon his acceptance of the money; and though mere words in the form of a protest, which may accompany a tender, will not defeat it where they can reasonably be regarded as idle words, their Lordships think that the proceedings of Ramrutton Roy with respect to the mortgagee's title to foreclose forbid such an interpretation of his language and his act. But independently of this objection to the payment, another and a graver reason exists for holding it to be not such a payment as the Regulations contemplate.

The title of Ramrutton to redeem was neither proved nor admitted. A grave suspicion rested on his alleged purchase, which the litigation, so far from dispelling, had increased. Had the mortgagee accepted his money, he would have admitted a title to redeem in which he was not bound to acquiesce; and as that title has not been proved in this case, the refusal must be viewed now in the same light as if the money had been tendered by one who had no title to redeem the mortgage, and who did not offer it with due consent, in the name of the heir of the mortgagee. Their Lordships think that the service of the notice on Ramrutton raised no case of estoppel. The mortgagee cannot tell the exact nature of an occupant's title in all cases, nor how far he may be entitled, with the mortgagor's consent to tender in his name. It is best to have a general rule, and service on the occupant is calculated to prevent errors. Consequently, their Lordships think that the objections to the foreclosure fail.

Had the course of proceeding in the Courts below admitted of a judgment for the mortgage money, with interest and costs, on a suit for possession of the property pledged to secure it, their Lordships would have so limited their decision on this appeal. As the decision in this proceeding is not final, it will not affect any right to redeem, to which the heirs of Bebee Noor Jeehan may be entitled, upon which their Lordships forbear from offering any opinion.

Their Lordships will recommend to Her Majesty to reverse the decision which has been given, and to direct judgment to be given for the plaintiff, with his costs below, and the costs of this appeal.

The 27th July 1859.

Present :

Lord Kingsdown, Dean of the Arches, Sir E. Ryan, Sir J. T. Coleridge, and Sir L. Peel.*

Raj of Tanjore—Escheat—Law of Nations (Independent States)—Hindoo Law of Inheritance (Property of Hindoo Sovereigns.)

On Appeal from the Supreme Court of Madras.

The East India Company,

versus

Kamachee Boye Sahiba.

The transactions of Independent States between each other are governed by other laws than those which Municipal Courts administer. Such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

The seizure by the British Government, acting as a Sovereign Power through its delegate the East India Company, of the Raj of Tanjore with the property belonging thereto, was, with its consequences, an act of State over which a Municipal Court has no jurisdiction.

Partibility is the general rule of Hindoo Inheritance ; the succession of one heir, as in the case of a Raj, the exception.

THIS is an appeal from a decree of the Equity side of the Supreme Court of Judicature at Madras, by which it was declared that the respondent, the plaintiff in the suit below, as the eldest widow of Sevajee, late Rajah of Tanjore, who had died intestate, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereof of the present debts, if any, of the said Sevajee, and to any legal claims and demands that might exist against such private and particular estate and effects ; and the Court declared that the defendants, the East India Company, were Trustees for the plaintiff for and in respect of the private and particular estate and effects, real and personal, left by the said Sevajee at the time of his death, and possessed by them, their officers, servants and agents, as in the Bill mentioned.

The decree proceeded to direct various accounts and enquiries founded upon these declarations.

In the very able argument addressed to us at the Bar, many objections were made by the appellant's Counsel to this decree : but the main point taken, and that on which their Lordships think that the case must be decided, was this —that the East India Company, as Trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in India ; that the Rajah of Tanjore was an independent Sovereign in India ; that on his death in the year 1855, the East India Company, in the exercise of their Sovereign Power, thought fit, from motives of State, to seize the Raj of Tanjore, and the whole of the property, the subject of this suit, and did seize it accordingly ; and that over an act so done, whether rightfully or wrongfully, no Municipal Court has any jurisdiction.

The general principle of law was not, as, indeed, it could not, with any color of reason be disputed. The transactions of Independent States between each other are governed by other laws than those which Municipal Courts administer ; such Courts have neither the means of deciding what is right nor the power of enforcing any decision which they may make.

But it was contended, on the part of the respondent, that this case did not fall within the principle, for the following reasons :—

1st. Because, as it was said, the East India Company did not stand in the position of an Independent Sovereign ; that such powers of sovereignty, as were exercised on behalf of the Company, were vested, not in the Company, but in Governor-General and Council, who are protected by Legislative enactments for what they may do in that character.

2nd. That the seizure in this case did not take place by the exercise of a Sovereign Power against another Independent Power, but was a mere succession, by an asserted legal title, to property alleged to have lapsed to the Company; and

3rd. That there is a distinction between the public and private property of the Rajah, and that the Company never intended to exercise their Sovereign Powers as to the latter, whatever they might do with respect to the former; that the Company, therefore, are in possession of property by the unauthorized act of their officers, for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court.

On the first point their Lordships are unable to discover any room for doubt. The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the Law, as it stood in the year 1839, is accurately stated in the following passage in the judgment of Chief Justice Tindal in case of *Gibson vs. the East India Company*, 5 Bing. N. C. 273, in which, after referring to various Legislative enactments, he observes that from these—

“It is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the Affairs of India), power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native Powers of India.”

That acts done in the execution of these Sovereign Powers were not subject to the control of the Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of the Nabob of Arcot *vs. the East India Company* in the Court of Chancery in the year 1793; and the Advocate-General *vs. Syed Ali*, before the Privy Council in 1826.

The subsequent Statute of 3 and 4 Wm. IV., c. 85, in no degree diminished the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of Sovereignty.

The next question is, what is the real character of the act done in this case? Was it a seizure, by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal Law? or was it, in whole or in part, a possession taken by the Crown under color of legal title of the property of the late Rajah of Tanjore, in trust for those who by law might be entitled to it on the death of the last possessor?

If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right, on the part of the East India Company, or of the Crown of Great Britain, to the possession of this Raj, or of any part of the property of the Rajah on his death; and, indeed, the seizure was denounced by the Attorney-General (who, from circumstances explained to us at the hearing, appeared as Counsel for the respondents, and not in his official character for the appellants), as a most violent and unjustifiable measure. The Rajah was an independent Sovereign of territories undoubtedly minute, and bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the Rajah without a son, by any legal title either as an escheat or as *bonâ vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds.

Accordingly, the appellants in their answers, page 4, paragraph 3, allege that, on the death of the late Rajah, “it was determined, as an act of State, by the defendants and the British Government,” that the Raj and dignity of Rajah of Tanjore

was extinct, and that the State of Tanjore had thereupon lapsed to the defendants in trust for Her Majesty ; and it was thereupon also determined by the defendants as an act of State and Government, that the whole dominions and Sovereignty of the State of Tanjore, together with the property belonging thereto, should be assumed by the defendants in trust for Her Majesty the Queen, and should become part of the British territories and dominions in India, in trust for Her Majesty.

They, then, allege that the whole of the property which they have seized by virtue of their Sovereign rights on behalf of Her Majesty, and insist that the Court has no jurisdiction to enquire into the circumstances of the seizure, or its justice with respect to the whole or any part of the seizure.

The facts, as they appear in the evidence, are these :— In November 1855, the Rajah died. The Government of Madras, within which Presidency Tanjore is situated, communicated the fact of his death to the Governor-General of India, and this fact, with the views of the Government of Madras, and of the Governor-General in Council, as to the steps which ought to be taken upon his death in regard to his dominion and property, was communicated to the Court of Directors in England.

The letters in which these views were communicated are not found amongst the papers before us ; but it appears from the letter of the Court of Directors, dated the 16th April 1856, page 60, that these Governments were of opinion that the dignity of the Rajah of Tanjore was extinct ; and that they had taken possession, or were about to take possession of the dominions and property of the Rajah, and intended to deal with them in such manner as appeared to them to be just.

The answer of the Court of Directors is to the following effect :—

After adverting to a suggestion which had been made, to recognize one of the daughters of the deceased Rajah as his successor, they say—

“ 3. By no law or usage, however, has the daughter of the Hindoo Rajah any right of succession to the Raj : and it is entirely out of the question that we should create such a right for the sole purpose of perpetuating a titular principality at a great cost to the public revenue.

“ 4. We agree in the unanimous opinion of your Government, and the Government of Madras, that the dignity of the Rajah of Tanjore is extinct.

“ 5. It only remains to express our cordial approbation of the intentions you express of treating the widow, daughters, and dependants of the late Rajah with kindness and liberality. We shall, doubtless, receive, at an early period, from you, or from the Madras Government, a report of the arrangements made for carrying these intentions into effect.

“ 6. The Resident was very properly directed to continue all existing allowances until he could report fully on them to Government ; but to inform the recipients that Government were not to be considered as pledged to their continuance.”

It seems obvious from this letter that the Company intended to take possession of the dominions and property of the Rajah, as absolute lords and owners of it, and to treat any claims upon it of his widows, and relations, and dependants, not as rights to be dealt with upon legal principles, but as appeals to the consideration and liberality of the Company.

The further proceedings were of the same character. On the 10th of July 1856, the Government of Madras wrote to the Governor-General in Council, and after giving an account of different portions of the property of the late Rajah, and pointing out various difficulties and questions which might arise out of it, they suggested that some persons should be specially sent as a Commissioner to Tanjore, who should be “ directed to investigate and report upon the various important questions above enumerated, and any others that may hereafter occur, to this Government, as demanding enquiry in connection with the general subject.”

By a letter of the 8th September 1856, the Governor-General in Council approves of the suggestion of appointing a Commissioner, and of the selection of Mr. Forbes for the purpose. He points out certain matters : amongst others, the

abolition of the Rajah's Courts, which he leaves to the disposal of the Government of Madras. "But the mode in which it may be proposed to deal with the Rajah's debts, and with the State jewels, library, and armoury, should be reported to the Government of India, before any measures are taken, as also the apportionment of pensions and gratuities to the family and dependants of the Rajah. Upon the last point it will be necessary to lay down rules by which the Government of Madras should be guided."

Mr. Forbes was accordingly appointed to discharge this duty, and written instructions for that purpose were given to him by the Government of Madras on the 25th September 1856. He was directed not to make any general announcement of the orders of the Government of India, but to possess the Durbar generally with the purport of those instructions, informing them that it had been decided by the Home authorities that the Raj of Tanjore had become extinct, but that all liberality would be shown to the members of the family, and dependants. He was also, should such caution appear called for, to warn them of the consequences that would certainly ensue from any factious opposition to the policy that had been decided on in the case of the Tanjore Raj." Appendix 80.

In what manner Mr. Forbes executed the powers conferred upon him, appears in his evidence by the documents proved in the cause.

On the 29th September, he caused an order to be made on the Sirkele, an officer of the late Rajah, directing him to make out a list of the property belonging to the Raj. No attention having been paid to this order, Mr. Forbes soon afterwards went himself to Tanjore and took up his abode at the Residency, and on the 17th October, 1856, sent a letter to the Sirkele, set out at page 85 of the Appendix, in which he informs him of the intention to take possession of the public property of the State for the British Government, and to place it in safe keeping. He informs the Sirkele that he intends to take charge of the public property within the Fort, early the next morning, and to place it in charge of a detachment of the British troops, and he requests that the Sirkele will meet him at the East Gate of the Fort at half past 5 o'clock, in company with the Murdeshuns of the Tashaekdera, the arsenal, and the various other departments.

On the following morning accordingly, taking advantage, as he says, of the presence of the 25th Regiment of Infantry, he goes to the palace. He takes possession of the property which is found in it. He has it placed in rooms, sealed with his seal, and stations sentries at the different doors.

It is clear from Mr. Forbes' report to the Madras Government, of what took place on the occasion that, though no resistance was offered by the family of the Rajah, or the inhabitants of the Fort, to the seizure of the Raj, and of the place and property of the Rajah it was regarded on the both sides as a mere act of power, not resisted, because resistance would have been vain. "Much sorrow," he says, "was expressed, and much grief was shown; but all submitted at once to the authority of the Government, and placed themselves in its hands."

It is by these acts of Mr. Forbes that the East India Company is in possession of whatever property it holds now claimed by the respondent. The acts of Mr. Forbes were approved by the Governor of Madras by a minute, dated the 21st of October 1856, and they are adopted and ratified by the appellants in their answer in this suit.

What property of the Rajah was within the authority given to Mr. Forbes, and what may be the consequence of any seizure in excess of that authority, we will consider under the next head; but that the seizure was an exercise of Sovereign Power effected at the arbitrary discretion of the Company, by the aid of Military force, can hardly admit of doubt.

But, then, it is contended that there is distinction between the public and private property of a Hindoo Sovereign, and that, although during his life, if he be an absolute monarch, he may dispose of all alike, yet on his death some portions of

his property, termed his private property, will go to one set of heirs, and the Raj with that portion of the property which is called public, will go to the succeeding Rajah.

It is very probable that this may be so ; the general rule of Hindoo Inheritance is partibility, the succession of one heir, as in the case of a Raj, is the exception. But, assuming this, if the Company, in the exercise of their Sovereign Power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at Madras ? If the Court cannot enquire into the act at all, because it is an act of State, how can it enquire into any part of it, or afford relief on the ground that the Sovereign Power has been exercised to an extent which Municipal Law will not sanction ?

It is said, however, that it was not the intention of the East India Company that the private property of the Rajah should be the subject of seizure, and it is observed in the judgment of the Court below that the letter of Mr. Forbes to the Sirkele of the 17th of October 1856, shows that he knew there was private property amongst that about to be seized ; and that he expressly states that all property to which a claim can be established shall be restored to its owner.

But it appears to their Lordships that in this passage the Chief Justice has not quite accurately collected the meaning of Mr. Forbes' letter ; the distinction there made between private and public property seems to apply, not to property of the Rajah, but to property which might be seized by the Officers as in the possession of, or apparently belonging to, the Rajah, while, in fact, it belonged to, or was subject to the claims of other persons. All claims which might be advanced to any part of the property seized by institutions or individuals, were to be carefully investigated, and all to which a claim might be substantiated would be restored to the owner.

But, whatever may be the meaning of this letter, it affords no argument in favor of the judgment of the Court, but rather, an argument against it. It shows that the Government intended to seize all the property, which actually was seized, whether public or private, subject to an assurance that all which, upon investigation, should be found to have been improperly seized, would be restored. But, even with respect to property not belonging to the Rajah, it is difficult to suppose that the Government intended to give a legal right of redress to those who might think themselves wronged, and to submit the conduct of their Officers, in the execution of a political measure, to the judgment of a legal tribunal. They intended only to declare the course which a sense of justice and humanity would induce them to adopt.

With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters, his relations, and dependants ; but they intended to do this according to their own notions of what was just and reasonable, and according to any rules of law to be enforced against them by their own Courts. In the letter already referred to, of the 8th September 1856, from the Secretary of the Government in India, to the Government of Madras, it is distinctly stated : "The relations whom the Rajah of Tanjore has left are in this position : they are without any rights of inheritance," and it then proceeds to enumerate those relations who are thus without any rights of inheritance, and mentions as the first amongst them the Queen Dowager, the respondent in this appeal ; and it proceeds to speak of all these relations as claimants upon the consideration of the Government, and to describe in what manner those claims are to be met. How it is possible, in the face of this declaration, to hold that it was the intention of the Government to recognize the right of inheritance of the respondent, and to exclude from seizure and subject to process of law, any portion of the property of the deceased Sovereign ? If there had been any doubt upon the original intention of the Government, it has clearly

ratified and adopted the acts of its agent, which, according to the principle of the decision in *Buron vs. Denman*, is equivalent to a previous authority.

The result, in their Lordships' opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign Power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction.

Of the propriety or justice of that act, neither the Court below, nor the Judicial Committee, have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy.

* They must advise Her Majesty to reverse the decree complained of, and to dismiss the plaintiff's Bill; but they will recommend that no costs should be given of the proceedings either in the Court below or in this appeal.

The 3rd December 1859.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir J. W. Colville.

Ancestral property (Meaning of)—Decree of Appellate Courts (obtained after compromise).

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Rajmohun Gossain and Jugmohun Gossain,

versus

Gourmohun Gossain.

Ancestral property is not confined to such property as the father derives from his father or any ancestor, but means at least immoveable property derived from the father, however acquired by him.

A decree of an Appellate Court, obtained after a compromise not to prosecute the appeal, was held to be an adjudication obtained, not only with great impropriety, but in effect by fraud.

THE parties to this litigation are three brothers, the surviving sons of a Hindoo of Serampore, who appears to have been a person of considerable wealth, called Raghub Ram Gossain. The appellants here are the two younger of those three sons, the respondent being the eldest. The object of the suit in which the appeal arises was to obtain possession of one-half of a landed property, called Lot Harit, which, at the time when Serampore was a Danish Settlement, was out of that jurisdiction, and was, as it still is, within the jurisdiction of the Calcutta Courts; the deceased having had considerable property, and probably the bulk of his property, within the jurisdiction of the then Danish Court of Serampore.

The respondent, the eldest son, admits the title of the appellants to the one-half of the estate which they claim, subject only to the important qualification that he claims to have a pecuniary charge on the property to a considerable amount, in respect of having, as he says, paid the price of it, the fact being that the estate was purchased by the father in the name of the eldest son; and the question raised is, whether the money, which was in fact paid to the seller, was or was not advanced to the eldest son (in whose name the purchase was made) for his father?

He alleges that the money was paid by him, and that he is still a creditor of the father for it; and the alleged charge in respect of it is, as has been said, the only objection which he makes to the claim of the appellants. The appellants deny that the money was paid by the respondent, and further insist that, whether or not it was paid by him, all questions relating to that alleged payment were

formerly the subject of dispute, and settled by adjudication; and therefore, that, if anything was ever due to him on the security for that party, nothing had remained due.

This, the only substantial point in dispute, was decided, in the first instance, in favor of the appellants, by the proper Court of original jurisdiction, the Zillah Court of Hooghly; but, on appeal to the Court of Sudder Dewanny Adawlut, that decision was reversed, and judgment given in favor of the respondent, which has brought the appellants hither.

The circumstances in which the claim arose were these:—The eldest son, the respondent here, appears, on the death of his father, which took place some time before the year 1840, to have taken possession of all his property; at least, he was believed to have done so, and treated as having done so. In consequence, litigation of various kinds arose in the family, on the part of the present appellants, on their own behalf, and also on behalf of the widow of a brother and probably of their sisters also, on one side, and the present respondent, the eldest son, on the other. Two of these suits were in the Danish jurisdiction at Serampore; the third, relating to the immoveable property out of that jurisdiction, *viz.*, the property now in dispute, Lot Harit, was within the Calcutta jurisdiction. The results of these three litigations were three decrees, one in the Danish Court at Serampore, of the 6th of November 1840, another in the same jurisdiction of the 14th of May 1841, and the other in the Zillah Court of Calcutta of the 31st of August 1841. They were all in favor of the present appellants, including not only the adjudication that a large sum of money was due from the eldest son, but also deciding for their title to shares of Lot Harit, the estate within the Calcutta jurisdiction.

One of these decrees, *viz.*, that of the 14th of May 1841, relating, it seems, to family jewels and other such specific goods, was not capable of appeal, or was not appealed from, and is out of the question; but the eldest son, the respondent here, did appeal from the decree of the 6th of November 1840, to the proper Court in Denmark, and did appeal from the decree of the Zillah Court of the 31st of August 1841, to the proper Sudder Court at Calcutta.

A family quarrel on so extensive a scale excited general attention, and an endeavour was made in a friendly and kind manner by the Governor of Serampore under the Danish rule, a gentleman of considerable station there, to effect a settlement of the disputes, and at last it was done.

The settlement was effected by an agreement, or *ruffanamah*, made on the 4th of August 1842, which is printed at page 16 of the Appendix. It is (translated) in these words:—

“*Serampore, August 4, 1842.*”

“The long-pending dispute between Baboo Gourmohun Gossain and his brothers having occasioned great scandal and inconvenience, the Hon'ble Mr. Hansen, the Governor of Serampore, being exceedingly anxious to terminate these differences, called both parties before him on the above-mentioned date, and having required them mutually to explain their wishes, prevailed upon them to agree to a settlement in the following terms:—

- “1. That all ancestral property should be equally divided into four shares.
- “2. That the sum of 15,000 rupees be paid to the elder brother Rajmohun.
- “3. That the sum of 15,000 rupees be paid to the third brother Jugmohun, from which is to be deducted the sum of 5,640 rupees, already paid him for the purchase of a house.
- “4. That in reference to the share of the fourth brother, deceased, which amounts to 15,000 rupees, Gourmohun agrees to pay his widow monthly interest at the rate of 5 per cent. per annum, and also to give a bond in the Serampore Court for the payment of the principal of 15,000 Company's rupees, if she should

adopt a son, when that son comes of age. Should she die without adopting a son, the sum of 15,000 rupees will be divided according to law into three parts among the three brothers, or their surviving families; and as security for this bond, will pledge property in Serampore to the satisfaction of the Court.

"5. That the sum of 10,000 Company's rupees be paid to the widow of the late Raghunath Ram Gossain, to be disposed of according to her own wishes, in full of all claim; and in case of her dying without making any disposition of it, Gourmohun relinquishes all claim to it.

"6. That the sum of 12,500 Company's rupees be paid by Gourmohun Gossain, on account of the house built by him after the death of his father; and that the house, together with the piece of ground in front of the house, do, after the payment of this sum, remain his sole and entire property; his brothers and their family agreeing to quit it, including Hurree Chootar's ground, consisting of fourteen cottahs.

"The sum which Gourmohun Gossain thus engages to pay, to settle all differences with his family stands thus:—

"To Ram Gossain	...	...	Rs. 15,000
"To Jugmohun Gossain	...	...	15,000
"Less for the house according to the deed of sale	...	...	5,640
			<hr/> 9,360
"To the widow of the late Raghunath Ram Gossain	...	...	10,000
"To the sisters...	...	...	10,000
"For the house in full	...	...	12,500
			<hr/> 56,860

"Of this sum Gourmohun Gossain engages to pay in cash the sum of (35,000) thirty-five thousand rupees, within thirty days from signing of the document, and the remainder of this sum, namely, 21,860 rupees, at the end of eighteen months from this date, with interest at the rate of 5 per cent. per annum, giving security for the same.

"In witness whereof the parties have hereunto set their hands this fourth day of August, one thousand eight hundred and forty-two.

(Signed)

"GOURMOHUN GOSSAIN.

"RAJMOHUN GOSSAIN.

"JUGMOHUN GOSSAIN.

"Signed in our presence,

"P. Hansen.

"John Marshman.

"Hurchunder Laheree.

"Krishno Comar Laheree."

Before proceeding to mention the next document, it should be observed as to the remarks which have been made upon the word "ancestral," contained in the first clause after the introductory part of the *ruffanamah*, that their Lordships are of opinion that "ancestral," as here used, is not confined to such property, if any, as the father had derived from his father, or from any ancestor; but the "ancestral" is here employed (and so the respondent himself, upon more than one occasion, has shown that he understood it), in the sense of "paternal" that is, as meaning property of the father, in whatsoever manner, or by whatsoever title, the father had acquired it; and, therefore, that "ancestral property" means property derived from the father; at least, immoveable property.

Some months after this agreement, viz., in February of the year 1843, mortgage bonds, as we may call them, were executed by the respondent, to his brothers respectively: one (in the same form, *mutatis mutandis*, as the other) was thus:—

"Know all men by these presents that, according to agreement concluded on the 4th August 1842, between me and my brother, Jugmohun Gossain and others, I have been bound to pay to the said Jugmohun Gossain, as his share of ready-money belonging to our late father's estate, the sum of Company's rupees (15,000) fifteen thousand, besides one-third of a sum of Company's rupees (12,500) twelve thousand and five hundred, that according to the said agreement was to be paid by me on account of the dwelling-house in this town ; and the said Jugmohun Gossain having, on the 25th January, this year, from the Court of Serampore, received his one-third of the above sum of Company's rupees 12,500 on account of the dwelling-house, and in part of the above 15,000 rupees, the sum of Company's rupees 8,442, partly by value of a house, and partly out of the sum of Company's rupees (35,000) thirty-five thousand, deposited by me in the said Court on the 2nd September 1842.

"I herewith, in conformity with the said agreement, execute to him the present deed of mortgage, whereby I promise to pay to him the remaining part of the last-mentioned sum, being Company's rupees (6,558) six thousand five hundred and fifty-eight, on or before the 4th of February 1844, together with interest at 5 per cent. from the date of the said agreement, 4th August 1842, and until the day of payment ; and to secure him the payment thereof, I pledge and mortgage to him, as second mortgage, the whole of my landed property, with building and appurtenances, situated within this Settlement, next after the sum of Company's rupees 6,558, for which I have this day executed a deed, a mortgage to Rajmohun Gossain.

"Further, I do herewith, in conformity with the said agreement, bind myself to allot to him, the said Jugmohun Gossain, before the 4th August 1843, this one-fourth share of our ancestral landed property, with appurtenances and buildings, that is to say :—

"1st. All property situated within the Settlement of Serampore, which at present stand registered in the joint name of mine and either of my brothers, Rajmohun Gossain and Jugmohun Gossain, or the late Nundomohun Gossain, including the services of the family deity, *Sree Sree Radhamadhujee Thakoor*, with the exception of the dwelling-house mentioned in the agreement, together with the ground belonging thereto, as per pottah No. 1372 ; and also the ground formerly belonging to Hurry Chootar obtained by the decree of the Serampore Court of 28th August 1841.

"2nd. The ancestral Talook, called Hooda Gopaulsingpore, in Umursee, in the Zillah of Midnapore.

"3rd. The patrimonial Talook, called Lot Harit, in the Zillah of Hooghly, together with the profits from the 4th August 1842.

"4th. Our patrimonial share of the house called Bassabautee, in Burrabazar, Calcutta.

(Signed)

"GOURMOHUN GOSSAIN."

"Serampore, February 6th, 1843."

It needs not be said that the property named in clause 3, Lot Harit, is that of which two-fourths are now in dispute ; and by the effect of the agreement, and these two mortgage-bonds, two-fourths of that property, among others, were allotted to the two younger sons.

It seems that some time after this, the respondent was desirous of obtaining, and, almost, of course, perhaps, for that reason, the appellants were desirous of not giving, a release, and accordingly the respondent instituted a suit for the purpose of compelling them to give it ; and he obtained a decree against them in the Court of First Instance. The proceedings in that suit are stated in pages 20, 21, 22, 23, and 24 of the Appendix ; the adjudicating part of the order being in these words :—

"It is therefore, directed that when the plaintiff Gourmohun Gossain, complies with the condition of the *ruffanamah* of the 4th August of the year 1842, filed in the present suit, and besides pays to Puddomonee Dabee, 438 rupees 14 annas, the

costs of suit No. 109 of the year 1838, and pays to Oornopoorno Dabee, Rajmohun Gossain, Jugmohun Gossain, Kuddumbenee Dabee, Dimla Dabee, Madhobee Dabee, Proshunno Dabee, Company's rupees 2,003, annas 2, the costs of Civil suit No. 969 of the year 1838; then he will be exonerated from the claims of the said individuals on account of the paternal property which they have inherited as the heirs of their father Raghob Ram Gossain, deceased. Both the parties will pay their respective costs of the present suit."

The present appellants appealed from that decision, and the decision was affirmed in the year 1849; the affirmance appears in page 28 of the Appendix. It is in these words:—

"No attempt has been made to show that the settlement was partial or unfair. The mere fact of compromise for a less amount than was legally due, cannot of itself impugn the settlement: for it is in evidence that great difficulty was experienced in executing the decree, and an appeal from it to Denmark, attended with ruinous expense, had been preferred.

"*Ordered.*—That the decision of the Court of Serampore be affirmed, and the appeal dismissed; and, in consideration of the special circumstances of this case, each party pay his own costs of the suit."

Now, it is with documents such as these, altogether unimpeached before us, that the respondent contends that the true meaning of what took place in the years 1842 and 1843 was this: that, though he was to divide Lot Harit, yet he was to divide it without prejudice to his claim as an alleged mortgagee, or holder of a lien, as we should call it, and that all that he was to give up was what we should call the equity of redemption, subject to that. Their Lordships, however, are of opinion that the documents themselves, whether the rest of the evidence be, or be not, considered, afford a plain and complete contradiction to that allegation.

Their Lordships are of opinion that such a construction of the documents, as would leave the respondent in possession of a pecuniary charge upon Lot Harit, is unreasonable and inadmissible.

If, therefore, there were no other difficulty in the case, the title of the appellants would be plain and clear, *viz.*, to have one-half of Lot Harit, and an account of the wasilat in consequence, as originally decreed: but this difficulty has arisen, notwithstanding the arrangements of August 1842 and February 1843, the respondent thought fit, but as their Lordships think against all propriety, to prosecute an appeal against the Zillah decree of the 31st of August 1841, which had given to the appellants shares of Lot Harit. Accordingly that appeal having been brought up, and substantially unopposed, the respondent obtained from the Sudder Court, on the 30th of March 1843, a decree, which is to be found in the Appendix p. 32. The ordering part is in these words:—

"Therefore it is finally ordered that the appellants' appeal be decreed, and the decision of the Judge of the date above stated be amended; and the plaintiffs, respondents, on the condition that, if they deposit in the Treasury of the Court from this date, within the period of six months, the purchase money of a 12 annas' share of Talook Harit, then they are to be put in possession of a 12 annas share without wasilat, and the whole of the costs of this Court, according to the account of *Khur-cha Nurvees* (Accountant of Courts), with interest thereon, from this date up to the date of realization, be entered against respondents. And if the appellant has deposited the cost of the Zillah Court, then he is to present a petition for its return, and the order for its payment, with interest up to the date of realization, according to the general order of this Court, dated the 3rd June 1837, A. D., will be passed."

Of course, the money was not paid, and the contention of the present respondent is that this decree of 1843 established the title which he alleges, and that, as the money was not paid within the period prescribed by the decree, he is entitled to claim the property as his own in a manner analogous to a title by foreclosure; and he says that he is willing to submit to what we should call redemption.

Their Lordships, however, are of opinion that the claim is entirely untenable.

Assuming (though their Lordships do not decide) that this decree of 1843 amounted to an adjudication against the present appellants' title, we think that it was an adjudication obtained, not only with great impropriety, but, in effect, by fraud; for it was plainly the duty, in every sense the duty of the present respondent, after the compromise (a compromise insisted upon by him) not to prosecute that appeal. Doing so, he did it at his own peril, for success could by no possibility benefit him, if his title, by reason of that success, should be properly impeached.

It is said that, on the assumption that the decree of 1843 is an adjudication against the present appellant's title, the fraudulent nature of the decree has not been put in issue, and it has not been in a proper manner sought to be set aside.

Their Lordships are not of that opinion. They are of opinion that the fraudulent nature of the respondent's conduct in obtaining the adjudication is sufficiently put in issue by the original plaint in the case, and by the replication, in both of which it is impeached, and, as their Lordships view the matter, in a proper manner impeached, for fraud, and the decree of the Zillah Court treating it as a nullity against the title of the present appellants was, as their Lordships' consider, properly made with costs, and ought to be restored.

If the appellants have paid any costs under the decision of the Sudder Court, those costs should be re-paid; and the present appellants should have their costs of the proceedings in the Sudder Court, and of the appeal here, from the respondent.

The humble recommendation of their Lordships to her Majesty will be accordingly.

The 8th December 1859.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner,
and Sir L. Peel.

Hindoo Law—Freehold Interest.

On Appeal from the Supreme Court of Calcutta.

Anundmohey Dossee and others,

versus

John Doe, on the demise of the East India Company.

No words of inheritance are requisite to continue to his heirs a Hindoo's interest in a freehold estate.

THIS is an appeal upon a verdict and judgment of the Supreme Court at Calcutta in an action of ejectment by the respondent against the appellants, and also for an order of the Court discharging a Rule *nisi* subsequently obtained to set aside the verdict, and for a new trial.

The ejectment was brought to recover two pieces of land lying between the Strand Road and the River Hooghly, in the town of Calcutta. This land had been gained from the River Hooghly by accretion, and at the time of the transactions out of which the ejectment arose, were in the possession of Baboo Mutty Loll Seal, since deceased, as the ostensible owner. His claim was, however, disputed by the East India Company, and Mutty Loll Seal, in the year 1841, appears to have been willing to have admitted their right to the land: for in two letters of the dates respectively of the 25th August and the 4th November 1841, he proposed to take it on a lease, "or, if Government were not agreeable to that, he wished them to give him a written assurance that he was to keep possession so long as they did not require the said plots for some other purposes themselves." Whether any such assurance took place upon these letters nowhere appears, but Mutty Loll Seal continued in the undisturbed possession of the two pieces of land from that time down to the year 1851. The Government had for many years before 1851, had it in contemplation

to construct a new road in lieu of the old Strand Road: and in that year the project seems to have been seriously taken up, and application was made to Mutty Loll Seal to give up the land in question for this purpose. These two pieces of land were immediately in front of other land the undoubted property of Mutty Loll Seal, from which they were only separated by the public highway called the Strand Road, so that, by the possession of them, he and his tenants had immediate and uninterrupted access to the river; Mutty Loll Seal had also built a ghaut with steps leading down to the river, upon other alluvial land abutting on one of the two pieces of land in question.

There can be no doubt that, when application was first made to Mutty Loll Seal to surrender the land, he believed that the project of the Government was to make a new Strand Road, and also, that this was the improvement originally contemplated by them. His expectation appears clearly from the first letter upon the subject, written by him to Mr. Smoult, the Solicitor of the East India Company, on the 31st March 1851, in which one of the conditions for which he stipulates is that "he shall not be required to surrender the land until the Government are prepared, and do actually begin to carry out the proposed improvement on the Strand Road." It is true that in this subsequent letter, written to Mr. Archibald Grant, the new Solicitor to the East India Company, on the 10th May 1851, he does not insist upon this condition, but he states explicitly—

"I make the surrender in the full belief that it is the intention of the Government to re-construct the Strand Road, and that, to obtain this most desirable purpose, it is necessary that they should be put in immediate possession of the land which I now hold; at the same time I have to request that, if any delay should take place, the land which I now surrender may not, in the meantime, be let to other parties, or applied to any other purposes than that of a road, as it might in such case become serious injury to my property immediately abutting on it to the eastward."

What was the improvement which was contemplated by the Government at this time is shown by the answer of Mr. Archibald Grant to Mutty Loll Seal of the 19th June 1851, after a communication from the Secretary to the Government, in which, treating the letter of Mutty Loll Seal as an unconditional surrender of his interest in the newly formed land on the Strand bank of the river, he adds:—

"I am directed by the Deputy-Governor of Bengal to communicate to you, in reply to your letter, that His Honor is gratified by the course adopted by you.

"I am directed to say, you may be assured that pending the execution of the project of a new Strand Road, which has been for several years in the contemplation of Government, the land now surrendered by you will not be let to any other party."

It has been observed in argument that Mutty Loll Seal imposes no condition upon the Government that they shall "re-construct" the Strand Road, but merely makes the surrender "in the full belief" that this is their intention; that although he requests that, if any delay takes place, the land shall not be applied to any other purposes than a road, as well as that it shall not be let to other parties, the letter accepting the surrender is confined to an assurance that, pending the execution of the project, the land will not be let to any other party, and that the surrender of his interest is to his own knowledge, treated as having been made unconditionally; from all which it is inferred that Mutty Loll Seal must have known, or at least have had strong grounds for believing, that the plan of the Government was not necessarily confined to the formation of a new Strand Road.

Down to this period of the correspondence, however, there does not appear to have been any other improvement in contemplation; nor was there anything to lead Mutty Loll Seal to believe that the land in question was wanted for any other purpose than for a road.

But before the actual surrender took place, some intimation was given which might have been sufficient to lead him (in some degree at least) to expect some alteration of the original Government scheme of improvement. In his letter to Mr. Archibald Grant, containing his offer to surrender the land, he says:—

"I have also to request that the Government should erect and build a ghaut at their own expense, on the banks of the river, precisely similar to that which is now erected and built at my own expense (only extending the ghaut-steps to the south side), as will appear by the enclosed plan. The columns, roof, and ornamental parts of the ghaut I am to be allowed to build at my own cost and expense, should the Government be pleased to approve of the above proposals. I beg to be favored with the honor of an answer."

And in answer he had been told :—

"Respecting your request for the building of a ghaut on the banks of the river, the columns, roof, and ornamental parts of which buildings you liberally offer to construct at your own expense, the Deputy-Governor desires me to say that the erection of a proper number of ghauts at suitable places is a part of the proposed plan of improvement, and the Government will gladly avail itself of your public-spirited offer when the time comes."

Mr. Longueville Clarke, who was the adviser of Mutty Loll Seal, on the 26th July 1851, wrote for an explanation to the Advocate-General :—

"MY DEAR JACKSON,

"In Mr. Secretary Grant's letter to Baboo Mutty Loll Seal, of the 9th of June last, it is not distinctly stated that the ghaut, which the Government undertake to construct in place of that which he built, and now surrenders, will be erected on the present site. I have explained to you why this is of consequence to Mutty Loll, and you tell me that such is the intention* of the present arrangement.

"Will you get a few lines from Mr. Grant to this effect, to remedy any misconception, should there be another incumbent in his office when the new ghaut may be built.

"Truly yours,

"LONGUEVILLE CLARKE."

To which the Secretary of the Government returned an answer, 4th August 1851 :—

"SIR,

"With reference to the communication from Mr. Longueville Clarke of the 26th instant made to you on the part of Baboo Mutty Loll Seal, which you showed to me a few days ago, and which I have laid before the Honorable the Deputy-Governor of Bengal, I am directed by His Honor to say that you can assure the Baboo that, if the bank of the river and the Strand Road remain as at present, the ghaut, whereof he has announced his desire of erecting the columns, roof, and ornamental part alluded to in my letter to the Company's Solicitor, No. 1235, dated the 13th ultimo, will be erected where the ghaut upon the land, of which the Baboo now gives up possession, at present stands; but if, as is anticipated, a new road be made, running in a line nearer to the river than the present line, the ghaut will be erected on the river bank immediately opposite the existing ghaut aforesaid.

"I have, &c.,

"J. P. GRANT,

"Secretary to the Government of Bengal."

This letter was not only communicated to Mutty Loll Seal, but it is referred to expressly in the agreement of the 11th October 1852, which was signed by him after his actual surrender of the land, and which agreement was prepared by Mr. Longueville Clarke on his behalf.

It certainly does appear extraordinary, if it was intended that the land should be surrendered only upon condition that a new Strand Road should be made; that they did not at once reject the idea of there being the least uncertainty upon that subject, and insist upon a literal compliance with this condition, as the price of the surrender of the land.

It is to be observed that this letter was written nearly three months before the actual surrender, which took place on the 27th October 1851. Before this event Mutty Loll Seal had conversations with Mr. Elliott; but although he states that in one of them "the Baboo said he would give up the land only for a public road," and Mr. Elliott insisted upon the alteration of the terms to "any public improvement," yet as he cannot fix the time of this particular conversation, but can only say it was "before signing the Agreement B" (the agreement of the 11th October 1852), it cannot fairly be taken to have occurred before the delivery of possession.

However, on the 27th October 1851 Mr. Elliott says:—

“I proceeded to the premises with Mutty Loll Seal after the verbal agreement: possession was formerly made over to me on behalf of Government, as proprietor of the soil, on the twenty-seventh October one thousand eight hundred and fifty-one, by Baboo Mutty Loll Seal in person, in presence of numerous witnesses, and restored to the Baboo as a tenant removeable at the pleasure of Government on one month's notice, as per separate agreement; a previous day had been fixed, and it was postponed to Munday, the twenty-seventh October, one thousand eight hundred and fifty-one.”

Some little difficulty has arisen as to the meaning of the words used by Mr. Elliott, “as per separate agreement.” Upon turning, however, to the evidence of Mr. Clarke, who was present at the delivery of possession, after speaking of the Bengalee kubooleut signed at the time, he says, “there was also an agreement to be signed;” so that Mr. Elliott, by the words “as per separate agreement,” must be understood to refer to an agreement to be afterwards made, which was to contain the terms upon which Mutty Loll Seal was to be allowed to remain in possession. It can hardly be contended that, before this agreement was entered into, Mutty Loll Seal had any interest in the land which could have been available against an ejectment brought by the East India Company upon the legal title acquired by his formal delivery to them.

Then, did the agreement of the 11th October 1852, place him in a better situation for resisting the enforcement of their rights in a Court of law? The appellants contend that the proper construction of this agreement is that they are entitled to hold possession until a month's notice has been given after the new Strand Road should have progressed so far as to render it necessary, for its further extension and continuation, that they should vacate the land; and that although there is no express mention of the road in the agreement, yet that the words “public improvements” and “projected improvements hereinbefore alluded to,” must be interpreted, by the reference to the correspondence with Mr. Secretary Grant, to mean nothing else but the new Strand Road.

But against this construction must be set the reference to the letter to Mr. Secretary Grant of the 4th August 1851, showing that the alteration of the Strand Road was not definitively decided upon, and the conversation with Mr. Elliott before this agreement was signed, in which he insisted upon the general words “public improvement” being inserted, for the very purpose of preventing its being alleged that Mutty Loll Seal had given up his land only for a public road. Now, construing the agreement by the aid which these circumstances afford, it would rather that whatever interest Mutty Loll Seal had in the possession, was contingent, not upon the formation of the new Strand Road, but upon the public improvements, of whatever nature the Government might ultimately determine to execute in this direction.

Of course, if this is the correct construction, then, even if Mutty Loll Seal's interest under the agreement was a legal one, it was determined by the notice given on behalf of the East India Company. But the real question upon the agreement is, whether it created any legal interest of any description. For the purpose of this consideration, let it be assumed that the “public improvements,” intended by the agreement, were the formation of a new Strand Road, and that, consequently, Mutty Loll Seal's possession was contingent upon the progress of that road. The lessors of the plaintiff had become the absolute owners of the land, and, upon the proposed assumption, they would have let Mutty Loll Seal into possession, under an agreement that they would not disturb him until after a month from a contingent uncertain event. What was the nature of this interest? Did it create any tenancy between the parties? If so, of what description? It certainly was not a tenancy for years; nor from year to year; nor for a year certain; nor for a month; nor for any other certain time. In the course of the argument for the appellants, it was suggested that the agreement passed a freehold interest, and, certainly, from the indefinite character of the interest given, it seems best to answer this description.

If the agreement could have created such an interest, there being no measure assigned by years or by any portion of time, although the stipulated rent was to be payable yearly, it could be nothing less than a freehold, and a freehold which would not end with Mutty Loll Seal's life, because, as he was a Hindoo, no words of inheritance were requisite to continue his interest to his heirs. The consequence would be, that his death not determining it, it would enure to their benefit, and have an indefinite duration till determined by a notice on the occurrence of the event contemplated. Now, an interest of this nature could not be created by parol, or by a mere writing, such as the instrument of the 11th of October 1852, which, therefore, could operate only as an agreement. Mutty Loll Seal having been admitted, or holding, under this agreement, and the same sort of possession being continued by the appellants, he and they after him could not be treated as trespassers, but were in as tenants-at-will; of course, such a tenancy was determinable by the mere bringing of an ejectment.

This appears to be the correct construction of the agreement, so far as the legal rights of the parties flowing out of it are concerned. It passed no legal interest out of the East India Company to Muttyloll Seal. The Company did not grant, nor did they intend to grant, as Hindoos; if they had so intended, they must have failed in their intention, for they could only grant according to law. Yet the instrument was binding upon them as an agreement, and a Court of Equity would have protected the appellants against any attempt to dispossess them contrary to its stipulations. Notwithstanding the provision which it contains for a month's notice, the East India Company might have maintained an ejectment the day after the agreement was entered into, because it passed no legal interest, but they could have been instantly restrained from proceeding by a Court of Equity.

Their Lordships, in determining this case, have confined themselves strictly to the legal rights of the parties, and have purposely abstained from expressing any opinion upon the equitable considerations which may be involved in it. They decide only that the ejectment was maintainable, and that the appellants had no defence to it at law; and this decision is made without prejudice to any equitable rights of the appellants, which must be understood to be fully reserved to them.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Supreme Court of Judicature be affirmed, and this appeal dismissed with costs.

The 8th February 1860.

Present:

Lord Kingsdown, Dean of the Arches, Sir E. Ryan, and Sir L. Peel.

Tora Garas Huk (Alienability of)—Onus probandi.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Sumbhoololl Girdhurloll,

versus

The Collect^r of Surat and Nussurwanjee Pestonjee.

Suit by the purchaser of a certain annual payment by Government, called *Tora Garas Huk*, sold in satisfaction of a decree. HELD that the *onus* was on Government to prove that there was something in the nature of this payment which made it incapable of alienation, and that the Government had failed to give such proof.

THIS is an appeal from a decree of the Sudder Dewanny Adawlut of Bombay, by which it has been decided that a certain annual payment, called a *tora garas huk*, is not by law capable of alienation, and that the purchaser of this interest at a judicial sale is not entitled either to have the sale enforced, or to have his purchase-money refunded to him by the individual who has received it.

The case is one, in many respects, of a remarkable character, and it appears to their Lordships to be advisable to state the circumstances in some detail.

Tora garas huks, whatever may have been their origin, are payments which, for many years before the period of the transactions which have given rise to the present suit, had been made by the Bombay Government, through their Collectors in the different Zillahs of Guzerat. The names of the persons receiving such payments, with the amount to be paid to them, were entered in the books of the Collector, and the payments were made according to the entries in such books out of the moneys received by the Collectors.

Amongst other such entries in the books of the Collector of Surat, was a sum of 347 rupees 13 annas, payable out of the Pergunnah of Orpad, and which in the year 1839 was payable, and had for some years been paid to a person named Bharmulsungjee. This annual sum is the subject of the present suit; Bharmulsungjee was also in the receipt of another *tora garas*, payable out of another Pergunnah within the same Collectorate, of 883 rupees. It appears that these two *huks* had previously belonged to a person named Koonsurwanjee; that he had died, leaving two widows, named Kasooba and Omedba, who had succeeded to this property; that these ladies had adopted Bharmulsungjee as their son, and thereupon these *huks* had been transferred into his name in the books of the Collector.

In the year 1839 a suit was instituted in the Court of the Sudder Ameen of Surat by the respondent Nusserwanjee, against Bharmulsungjee, and against Kasooba and Omedba, in order to recover a debt due from these parties to the respondent, and which debt was secured by a mortgage of the two sums of *tora garas* standing in the name of Bharmulsungjee.

Pending the proceedings in this suit, Nusserwanjee caused a sequestration to be laid on these *tora garas huks* in the office of the Collector of Surat, the nature and object of which could not but be known to the Collector.

On the 23rd July 1839, Nusserwanjee obtained a decree in his suit for the sum of 12,745 rupees, with interest, against the mortgaged property and against the defendants personally. Regulation IV of 1827 of the Bombay Code of Procedure directs the mode in which the attachment and sale of any of the immoveable property of the debtor, against whom a decree has been obtained are to be effected. It is thereby provided that, on a petition for such sale, the property shall be distinctly specified, with the probable value thereof; that the Court, on hearing the application, shall issue such order as may be requisite towards the enforcement of the decree; that, whenever a sale takes place under a decree, it shall be by public auction, after public notice, by a proclamation in a specified form, intimating that the property will be sold on a day named, unless the sale shall be objected to by another claimant, who, within fifteen days after the date of the proclamation, shall establish, to the satisfaction of the creditor, or of the Court, a right or interest in the property under attachment, or shall enter into an engagement to prosecute his claim within a limited time.

In order to recover the amount awarded to him by the decree in the manner pointed out in this Regulation, Nusserwanjee, on the 21st September 1839, presented a petition to the Judge of the Zillah Court, and thereby, after stating the decree which he had obtained, and the sequestration which he had issued, he prayed that the Sheriff might be ordered to attach and sell the produce of the undermentioned *tora garas* belonging to the defendant, according to the usual custom.

The *tora garas* (which included the particular sum now in dispute) was thus described:—

“The defendant Kasooba Omedba used to receive the produce of the *tora garas huks*, belonging to their husband Koowursungjee, payable from the Thanahs of the Pergunnah of Orpad and the Talooka of Koorsad. In the Sumvut year 1887, the said defendants, Kasooba and Omedba, adopted the defendant Bharmulsungjee as their son. From that day forward the amount of the produce

from the said Pergunnahs has been received by the defendant, Bharraultungjee. The value thereof is about 11,000 rupees."

On the same day, the 21st September, an order was issued by Mr. Herbert, the Assistant Judge of the Court, to the Sheriff, directing him to proceed according to the usual practice, and to make a return in thirty-five days.

Under this order the *tora garas* in question was attached by the Sheriff; proclamations of sale were issued, and the sale was fixed for the 19th October.

Before, however, the day fixed for the sale, Bharmulsungjee presented a petition to the Court, praying that the sale might be delayed for six months, in order to give him an opportunity of satisfying the plaintiff's demand, which he promised to do within six months.

The sale accordingly was stayed by an order of the Court, till Nusserwanjee should have answered the petition. He objected to any further delay, and, on the 14th November 1839, applied to the Court that the sale might be completed; that fresh proclamations might be issued; and that, as the property was likely to sell better at Surat than in the village in which it was situate, the sale might be made at Surat.

On the same day the Judge made an order, directing the Sheriff to enter into an investigation of the proceedings which had already taken place in this matter, and to make a report, and to enquire whether there was any objection or not to selling the property in Surat. The Sheriff made his report, stating the proceedings which had already taken place, and that there appeared to be no objection to the sale being made in Surat.

On the 27th November, Mr. Elliott made an order upon this report, that the Sheriff should sell the *tora garas* of the defendant in Surat; but that he should give notice of the sale of this *tora garas* to the inhabitants of the Zillah in which the *tora garas* was, as also to the inhabitants of the city of Surat, and should take care that no fraud or mistake was permitted to take place in the sale.

Proclamation was accordingly issued for sale of this *tora garas* in Surat on the 24th December 1839. The proclamation required any person making any claim to this property to come in and object to the sale.

No objection was made, and, on the 24th of December 1839, the property was accordingly put up for sale, and the appellant in this case was the highest-bidder, and he became the purchaser of the *tora garas* now in dispute for the sum of 3,430 rupees. He paid his purchase-money into Court, and the amount, after deducting the expenses, was paid to Nusserwanjee; and, on the 23rd of January 1840, Mr. Elliott, the Judge of the Court of Adawlut, executed a Bill of Sale of the *tora garas* to the appellant. This instrument, after reciting the facts already stated, concluded in these words:—

"Now, as you have paid that amount (3,430 rupees) to Government, you have become the owner of the *tora garas huk* belonging to the above-mentioned defendant Bharmulsungjee, and the right to receive the amount of the *tora garas huk* from the Thannah has been vested in you. Therefore the defendant's right to the *tora garas huk* (347 rupees 13 annas) has been sold for 3,430 rupees by the Government Adawlut, through the medium of the Nazir, in conformity with the usual custom in sales by auction, in this manner, *viz.*, "You may continue to take every year, according to the rules of the Pergunnah, the amount of the aforesaid allowance of *tora garas* belonging to the above-mentioned defendant Bharmulsungjee, from the Thannah of Orpad. In so doing, there shall be no objection."

We have thought it desirable to go into this detail, because it shows very distinctly that the Bombay Government, through its officers, had abundant notice of what was taking place with respect to this sale, and had ample opportunity, if it meant to object to the alienability of property of this description, to interpose to prevent it; or, at all events, to give public notice that, as far as the Government was concerned, the validity of the sale would not be recognized.

But the Government did nothing of the sort ; it made no objection to the attachment of the property which its officer was to pay ; and it permitted the respondent Nusserwanjee to sell, and the appellant to purchase, and the one to pay, and the other to receive, the purchase-money, without giving the least intimation to either that any obstacle would be raised to the enjoyment by the purchaser of what he had bought.

The appellant having thus completed his purchase, applied to the Collector of Surat to have his name substituted for that of Bharmulsungjee in the Collector's books, and to have the *tora garas* regularly paid to him accordingly. With this application the Collector seems at first to have been disposed to comply. He afterwards, however, declined to enter the appellant's name in his book, and ordered that the name of Bharmulsungjee should be retained ; but that the money should every year be paid to the appellant.

The appellant was not satisfied with this order ; and, on the 22nd July 1840, presented a petition to the Court in which the sale had been made, in which he alleged that other *tora garas haks* had been sold by order of the Court, and that the names of the purchasers had been duly inscribed in the Collector's books ; that all property sold through the instrumentality of the Adawlut is caused to be given into the possession of the purchaser through the assistance of the Adawlut, and he, therefore, prayed that the Judge would address a letter to the Principal Collector, directing him to erase the name of this *Grasia* from the records, and to enter the *tora garas* in the appellant's name in the records, and to continue to pay him the amount of the *tora garas* every year, as mentioned in the Bill of Sale.

On the 27th July 1840, the Judge made an order in which, after reciting that the appellant was the owner of the *hak*, and that of this fact the Court had no doubt, he ordered the Sheriff to write a letter to the Principal Collector, directing that gentleman to enter the petitioner's name in the *garas hak* of Bharmulsungjee which the petitioner had purchased, and to continue to pay the amount of the *hak* to the petitioner.

Such a letter was accordingly sent, and, thereupon, the Collector seems to have communicated with the Revenue Commissioner, and to have reported his opinion, either that the *tora garas* should be appropriated by the Government, and the purchase-money re-paid with interest, to the appellant, or that his name should be entered in the Collector's books.

The matter, however, was referred to the Bombay Government, and the appellant was informed that, as soon as any decision was come to a communication would be made to him. No communication having been made, the appellant in 1842 again applied to the Revenue Commissioner, praying that his name might be entered in the books of the Collector, or that, at all events, the three years' arrears then in the hands of the Collector might be paid to him in order that he might not suffer loss in interest and compound interest. The answer returned to him was that his name would not be entered, neither would the money be paid ; but that if he instituted a suit in the Adawlut, the money would be sent there during the life-time of the *Grasia*, and that, if he had any claim, he should file a suit.

The appellant seems to have entertained a very natural reluctance to adopt a course attended with so much expense and delay, and the Revenue Commissioner having been soon after changed, he attempted once more to obtain redress by a petition to the new Revenue Commissioner, but without any success.

On the 21st November 1842, the appellant presented his petition to the Judges of the Sudder Adawlut, stating the facts of the case, and praying either that the Collector might be ordered to enter the appellant's name in his books, and to pay him the *hak* regularly, or that the purchase-money, which he had paid into the Adawlut of Surat, might be refunded to him with interest.

This case seems to have been several times under the consideration of the Court. At length, on the 28th February 1843, an order was made by which the petitioner was left to file a suit in the Civil side of the Court.

It was under these circumstances that the appellant filed his plaint in the Court of the Assistant Judge of Surat on the 16th October 1843. This suit was instituted against the Collector of Surat, and also against the respondent Nusserwanjee. As against the Collector it prayed that the *tora garas* in question might be entered in the name of the appellant, and that the Collector might be ordered to pay him the four years' arrears then due, amounting to 1,391 rupees 4 annas. As against Nusserwanjee it prayed that, if it should appear to the Court that Nusserwanjee had caused the *tora garas* to be improperly sold, he might be ordered to refund the purchase-money with the profits for four years.

The Collector was authorized to defend the suit on the part of the Bombay Government, and he filed his answer on the 19th February 1844. He did not dispute any of the facts stated by the appellant in his plaint. The substance of his answer was that Bharmulsungjee, to whom this *tora garas hüks* had belonged, was a Grasia ; that, before the English Government took possession of the country, the Grasia people used to levy certain *hüks* and necessities from the villagers as the price of their abstaining from plundering the villages ; that, after the English Government took possession, an agreement was entered into with these people that they should receive this *hük* from the Government Treasury, and not from the villagers, in order that thereby the villagers should not suffer any oppression ; that the custom had always obtained to pay this *hük* to the Grasia only ; that the Government had never agreed to pay this *hük* to outsiders ; that, if the payment were made to other persons than Grasia, the agreement would be broken, because if the Grasia got nothing to eat, they would begin to plunder ; that Government would then suffer loss, and the villagers would suffer oppression. Then followed this sentence, which we confess ourselves unable to understand :

"The Government have settled the personal property of the Grasia, and, if this property does not reach them, the claim of the Government to the same is going on."

With respect to the appellant's allegation that *tora garas* had been previously sold by the Courts without any objection, the answer stated that, if this had happened, it had happened without investigation, and that the right of the Government was not done away with, because it was agreed to pay this *hük* to the Grasia alone.

The defendant Nusserwanjee put in an answer, insisting that his proceedings had been entirely regular, and that he was under no circumstances liable to any demand on the part of the appellant. But the view which their Lordships take of this case makes it unnecessary for them to go into the particulars of his defence.

On the 14th September 1844, the appellant filed his replication, in which he insisted that, if the Government had any objection to make to this sale, the Collector might and ought to have interposed to stop it, and to remove the attachment which had been previously laid upon the property, and that he was bound to adopt this course by the effect of the Regulation under which the sale had been made, and of the proclamation which had been issued in pursuance of it ; that the tax of the *hüks* of the Grasia and of the Moguls used to be levied from the villages in the same way as the Government Revenue : that these *hüks* were incorporated in the revenue, and that the *tora* was fixed by the Government ; that many *tora hüks* and other *hüks* had been sold by the Government Adawlut, and by the Collector ; and that the names of the purchasers had been entered by the late Collector in the Government Records, and the money for the same had been paid by the late Collectors, and was paid by the defendant, the then Collector, up to this day.

There does not appear to have been any rejoinder, and upon this state of the record the parties went into evidence.

The appellant proved the several proceedings which had taken place previous to the institution of the suit which have already been detailed ; he proved some instances, and one in the Pergunnah of Orpad, in which *tora garas* had been

the subject of sale, and the purchaser had been put into possession of the property, and was then in possession; and he specified several other instances in which, as he stated, the same thing had been done with respect to *tora garas*, and other *garas haks*, and of which he alleged that entries had been made in the books of the defendant, the Collector; and he required the production of these books, and summoned witnesses, who were Record-keepers in the office of the Collector, to attend and produce these documents.

It is with great regret that their Lordships are compelled to observe that, on looking at the depositions of two of these gentlemen, at pages 49 and 52 of the Appendix, it appears that these documents were not produced, and that it is impossible to avoid the inference that they were purposely withheld by the Agents of the Government defending the suit on its behalf. It is, however, in the opinion of their Lordships, sufficiently established that up to the period of this sale these *haks* had been the subject of sale, and had been considered and treated by the Courts of Justice and by the Government, in this Collectorate at least, as liable to be dealt with like any other species of property.

That this had been done without investigation, as the Collector in his answer alleges, is certainly not the fact.

For many years before 1839, enquiries into this subject had been made by different officers of the Indian Government. The origin and character of these payments; the question whether the Government was bound to continue them, even to *Grasias*, or was at liberty to resume them at its pleasure; the expediency of exercising that right if it existed; the question whether the *Grasia*, if he had any right to receive them, enjoyed more than a life-interest, and whether such interest, as he had, was capable of alienation; whether the collection of these payments by the Government was voluntary on their part, and could be discontinued at pleasure, or whether they were charges on the revenue, which the Government, receiving the revenue, was bound to pay;—all these questions appear to have excited the attention of the Government, many of them as early as the year 1817, and to have been the subject of discussion and consideration for many years subsequently.

It further appears that 1836, the liability of these *haks* to sale under the process of the Court, had come under the consideration of Mr. Lumsden, then Acting Assistant Judge at Broach, another Zillah in this province; that he had consulted Mr. Sutherland, a very high authority, who was then, or had been, Assistant Judge at Surat, and that he received from that gentleman the following answer, dated the 29th December 1836:—

“SIR,—In regard to your letter of the 19th instant, I have the honor to inform you there are very few instances of the attachment and sale, of *tora garas*, but there is no doubt when such description of property is possessed, a party having a decree against the property may attach and sell, in satisfaction thereof, *tora garas* in like manner as any other description of property.

“*Tora garas*, like every other description of *garas* is *wullun*, but is entirely unconnected with hereditary or other office, and is consequently distinct from the Regulations and Orders you have quoted. *Tora garas* is money-payment of a fixed nature on a village *jumpa*, and being usually the most secure description of *garas*, would be, no doubt, of the highest value in the market.”

The Collector put in evidence, on the part of the Government, the certificates which had been returned by various Collectors as to the practice in their Collectories, and the opinions entertained by them of the nature of these *garas haks*; and two agreements, one entered into by Captain Robertson with the *Grasias* of the Pergunnah of Atroleea in the year 1818, and the other by Mr. Crawford with the *Thakoors* of Dehejaun in the year 1825; but, with respect to the origin of the particular *tora garas* in dispute, or of *haks* of the same description in the same pergunnah, no evidence was offered. The proceedings which had taken place in some ~~suits~~ after the institution of the present, were also put in evidence.

The case came for hearing before two Judges of the Zillah Court in succession, who were both of opinion that the *tora garas* in question could not be enjoyed by any but Grasia; and that no decree could be made, either against the Collector or against Nusserwanjee.

It was then brought by appeal before the Sudder Dewanny Adawlut of Bombay, and after various proceedings which their Lordships do not think it necessary to go through in detail, a decree was pronounced in the Sudder Court on the 19th December 1849, by which the decree of the Court below was reversed, and a decree pronounced in favour of the appellant against the Collector, by whom all costs were ordered to be paid.

In October 1851, the then Collector applied for a review of the decree: *first*, on the ground that, according to the course of procedure then in force, the question of the non-alienability of the *tora garas* was not properly open to the consideration of the Sudder Court, but had been conclusively settled by the judgment of the Zillah; and *secondly*, that, if such question was open, it had been erroneously decided.

This review appears to have been granted, as a matter of course, without argument or reasons assigned by the Court; but nothing was done upon it till the month of April 1853. At this time all the Judges of the Court who had heard the case argued, had been changed.

It is impossible to view, without jealousy, such a proceeding as this. The Government which appoints the Judges, and removes them at pleasure, had raised a question of great general importance, which had been decided against it. Two years elapse before any application is made to the Court for a review of the judgment, and two more years elapse before the cause is brought on for re-hearing before a new set of Judges.

Upon the matter being brought before them, these gentlemen were of opinion that the only question open to the Court was whether, assuming the *tora garas* not to be alienable, which they held to have been concluded by the decree of the Zillah Court, any demand could be made against Nusserwanjee to refund the purchase-money. The decision of the Sudder Court of 1849 was referred by order of the 20th April 1853, and the case was returned to the Full Court to decide the last point.

Before, however, the cause came on again for hearing, an alteration was made in the Law of Special Appeals by an Act of the Indian Legislative Council, which, in the opinion of Judges, left the consideration of both questions open to them, and accordingly both questions were argued, and on the 16th February 1857, the Court pronounced the following decree:—

“The Court are of opinion, and decide that *tora garas* is not alienable, and that, therefore, Sumbhoolall took nothing by his purchase; and that his claim against the Collector must be thrown out; that Nusserwanjee Pestonjee guaranteed nothing, and, therefore, Sumbhoolall cannot come upon him to be reimbursed the amount of his purchase-money, and, therefore, that his claim against Nusserwanjee must also be rejected. The appeal is, therefore, dismissed with all costs on appellant.”

The propriety of this decree we have now to consider.

Whatever may be the nature of the payments called *tora garas*, and the right of the Bombay Government to refuse to treat them in ordinary cases as the subject of sale or mortgage, like other species of property, their Lordships cannot but entertain serious doubts whether it is consistent with justice to permit the Government to raise such a defence in this case, and as against the present appellant.

As we have observed in going through the proceedings, the Government had recognized the rights of inheritance and succession in this identical property; it had authorized its subjects to consider that property of this description was the subject of sale; and it had had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into Court, and paid to the creditor, and a conveyance of the property executed by the Judge of the Court to

the appellant; the Collector, that is, the Officer of the Government, standing by and acquiescing in the proceedings, with full knowledge of the objection to the sale, if any objection existed.

That, after all this had taken place, the Government should insist, and that the Court should decide, that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase-money, but pay all the costs which had been incurred in his attempt to obtain redress, seems hardly consistent with ordinary notions of justice.

But if there were not this objection to the defence, their Lordships are of opinion that the *onus* lies upon the Government to prove that there is something in the nature of this payment which makes it incapable of alienation, and that the Government has failed to give such proof.

On any evidence of the origin of the particular payment in question, there is no trace to be found in the case. The investigations into this subject to which we have alluded, have led persons of great learning and ability to different conclusions. It is very probable that *tora garas haks* had not all the same origin. Assuming, however, that they all began in wrong and violence, still, that which had a vicious origin may, in course of time, have been legalized, since long enjoyment is itself a title, as well in favor of the recipient of an annual payment out of land, as of the possession of land itself.

The question here is, not whether the Government can be compelled to receive and hand over these sums, but whether, actually receiving them, and having been in the receipt of them for very many years, it is entitled to say that it will not pay them to the alience of the person to whom, but for the alienation, they would be paid.

The creditor in this case has sold, and the appellant has purchased, such interest as the debtor had in the property sold. He will be, by the transfer, in no better situation than the debtor. If this payment be conditional on the good conduct of the *grasias* generally, or subject to any other condition, and if any circumstances should occur, which would justify the Government in withholding the payment from Bharmulsungjee, they will equally justify the withholding it from the appellant.

Whatever this payment may be, it clearly is not in the present case, on the evidence before us, at all analogous to the pay of a Military Officer, to which it was attempted at the Bar to liken it. It is not a personal payment in consideration of services to be personally performed. There is not the slightest trace of any services being claimable from Bharmulsungjee, and the mode in which he acquired the property seems to show that this is not the nature of the payment. The defence here raised by the Collector is not so much that the *hak* is incapable of alienation, as that it cannot be alienated except to *grasais*; but we are quite unable to find in the evidence, or indeed, in any other source of information, to which we have had access, any distinct account of what is meant by the term "*grasias*." They do not appear to be any distinct class or tribe. If the term be used to describe freebooters, or lawless people generally, it makes the defence a very singular one.

Upon the whole, their Lordships are of opinion that the Government has failed to establish its defence, even supposing such defence, under the circumstances, to be competent to it, and that the decree complained of must be reversed, and a decree pronounced in favor of the appellant, with all the costs to which he has been put in the course of these proceedings.

With respect to Nusserwanjee, the appellant must pay his costs, and have them over against the Collector.

A point is suggested in the appeal papers that the non-liability of this *tora garas* to alienation had been established by the decree of the Zillah Court, and that this decision was not, according to the Regulations, subject to review by the
Sudder.

It is unnecessary to consider whether the order of the 20th April 1853 could be sustained as the law of procedure then stood: for, however that may be, their Lordships are of opinion that the subsequent Act of the Indian Legislature was rightly construed, and that the Court properly decided at the last hearing that the whole subject was open to their consideration.

The appellant in this case has been kept for more than twenty years out of the possession of the annual payment of which he became entitled, and has lost, during the whole of that time, the interest of his purchase-money. Their Lordships think that they should do justice but very imperfectly, if they were to award to him only the arrears of his annuity. The Government has been in the receipt of these sums which belonged to the appellant. In 1842 the Government undertook to pay the money annually to the Adawlut, if a suit were instituted; if this has been done, and the Fund has been invested, the appellant will receive the amount. If the money has not been paid in (and we do not observe any allusion to such payment in the subsequent papers), we think that the appellant must receive simple interest at the rate allowed by the Court on the arrears due when the suit was instituted; and on each subsequent payment as it accrued due.

Their Lordships will make a report to Her Majesty in conformity with the opinion which they have expressed.

The 7th March 1860.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

ChamPERTY and Maintenance—Action—Agreement (for lease of Zemindary).

On Appeal from the Sudder Dewanny Adawlut at Madras.

G. F. Fischer,

versus

Kamala Naicker, Zemindar of Ammanaiknoor.

Quere.—Whether Champerty or Maintenance according to English Law is forbidden by the Law of India.

Although a Court may have the right, and is perhaps even under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of a proceeding showing that it is against morality or public policy, yet where this is only to be collected from the evidence by inference, and is capable of explanation or answer by counter-evidence it is highly inconvenient, and may lead to the most direct injustice, to enter into the enquiry if the issue has not been presented by the pleadings or the points recorded for proof.

Where *A* sues in respect of his own interest for the violation of a contract made for him by *B* as agent only, the assignment of *B*'s interest, under the agreement in order to enable *A* to bring his suit, is not Champerty or Maintenance.

Where an agreement to grant a lease was incomplete and conditional upon an advance within 8 days required to meet pressing demands, a delay of 19 days was held to be unreasonable, and likely to defeat the object of the lease.

THIS was a suit in the Civil Court of Madura to recover damages from the respondent for the breach of an agreement. Judgment was passed in that Court for the appellant, and this judgment was reversed in the Sudder Adawlut. The present appeal is brought for the purpose of procuring a reversal of that decree.

The facts on which the case arise are in substance these:—On the 25th October 1846 the agreement in question was entered into between the respondent on the one hand, and Narisahma Chettyar on the other, who is thus described in the commencement of it: “a dealer in silk thread, an agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad.” Narisahma was in truth acting as Fischer's (the appellant's) agent, whose residence was at Salem, and he was at the time absent on circuit as described.

The agreement is set out at page 40 of the joint Appendix.

On the day of the execution of this instrument the respondent also executed a bond and conditional mortgage of a village attached to his zemindary, for a loan of 1,000 rupees from Narisahma, which were then advanced, and were to be repaid on the 1st November following; this was to meet one of the debts enumerated in the preceding agreement. In this transaction also Narisahma was acting as, and was described in the instrument to be, "the agent of Mr. Fischer, residing at Salem, but now on circuit at Ramnad."

The appellant did not return by the 1st November, nor until some days after the 9th on which day, in violation, as the appellant alleges, of the agreement to which he claims to have been the principal party, the respondent executed a lease of the zemindary to one Mr. Fondclair.

This led to proceedings in which Narisahma was made the plaintiff for the purpose of enforcing the performance of the agreement. These proceedings failed, and the lease to Fondclair was supported; whereupon the appellant determined to institute the present action for damages, and Narisahma being dead, it was thought desirable for him to institute it in his own name; but the original agreement having provided that the lease should be made to Narisahma, and he having been the ostensible party to the previous proceedings, the following assignment was procured from his son, Condiah Chettyar, (*see* Appendix 4, No. 12). The action and appeal then followed, which have been already mentioned.

The decree of the Sudder Adawlut did not pass on the merits, nor on any point raised in the Court below; but it having been objected that the suit disclosed a case of Champerty, the Court resolved to entertain the objection; because, as they say, they thought themselves responsible for upholding the law in its integrity; they confined the addresses of the pleaders on either side to that one question, and decided the case against the present appellant on that point only.

Their Lordships are clearly of opinion that the decree of the Sudder Adawlut on this respect cannot be supported. The grounds on which they arrive at this conclusion make it unnecessary to decide whether, under the Law which the Court was administering, those acts which in the English Law are denominated either maintenance or champerty, and are punishable as offences, partly by the common law, and partly by Statute, are forbidden; and also, if so forbidden, whether the point was in this case so raised by the pleadings or the points for proof recorded by the Court, that it could be properly entered into. They will observe, however, in passing, that although it may be admitted that the Court would have the right, perhaps even lay under an obligation, to take cognizance *motu proprio* of any objection manifestly apparent on the face of the proceeding, which showed that it was against morality or public policy: yet where, as here, that was only to be collected from the evidence by inference, and was capable of explanation or answer by counter-evidence, it is highly inconvenient, as well as contrary to the ordinance which regulates the practice of the Court, and may lead to the most direct injustice to enter into the enquiry if the issue has not been presented by the pleadings, or the points recorded for proof. But assuming that in the present case the Court properly instituted the inquiry, their Lordships do not agree with them in the conclusion to which they conducted it.

The Court seem very properly to have considered that the champerty, or more properly, the maintenance into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by the English Law: it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary. It was necessary, therefore, to look at the substance of the transaction, and not merely the language of the instruments. Now, here it is clear that the appellant was the real party to the original agreement; and the person really interested in its performance; he was to advance the loan;

the profits that were expected to result from the loan were to be his; he might have intervened in the first instance, and conducted the litigation which first ensued in his own name. Narisahma was but an agent, contracting for the appellant in his own name, but avowedly as agent only, not undertaking to borrow from the appellant the money, and then lend it to the respondent, but to procure for him the loan of it from the appellant. All this was perfectly consistent with his being put forward as the ostensible party, with the full knowledge of the respondent. This was the substance of the contract, and the Court should have treated the assignment from Condiah Chettyar as merely an unnecessary precaution unwisely adopted perhaps, and furnishing an argument for an objector, yet not really altering the quality of the transaction, nor affecting that point on which the whole question of maintenance depended, which was this—Was the appellant suing in respect of his own interest for a violation of a contract made with himself, or was he representing another man's interest, and suing on a contract to which he had been originally a stranger, in virtue only of the objectionable assignment? If this had been borne in mind, their Lordships think that the Court would have arrived at a different conclusion from that which they in fact came to.

Here, therefore, their Lordships would have stopped, simply recommending that the judgment should be reversed; but in the commencement of the argument it was arranged, with the consent of the Counsel on both sides, that if their Lordships should be of opinion that the decision of the Court below could not be sustained on the grounds on which it had been based, they should proceed to consider the whole case on its merits, and finally dispose of it—a course by which it was probable that much litigation and expense might be saved to the parties.

Their Lordships have, therefore, examined the facts of this case as they appeared before the Civil Court of Madura. As it is indisputable that a lease of the zemindary has not been granted to the appellant or his agent Narisahma, it is clear that the appellant ought to recover if there was ever a binding contract between the parties to grant one, unless the non-performance of that contract be in any way justifiable. The first of these must be ascertained by an examination of the agreement of the 25th October 1846 of the circumstances attending its execution, and of the remaining facts of the case. The instrument commences with a recital, that the respondent was under an obligation to pay his creditors the sum of 1,90,035 rupees 2 annas 7 pie, made of items, of which an enumeration follows, and this enumeration shows that the money was wanted without the least loss of time, that the pressure on him was urgent. It then recites a promise from Narisahma to procure the amount from the appellant on his return to Madura; and then it promises to grant the lease; but only “in the event of Narisahma getting the said sum accordingly.” It then proceeds to stipulate for a number of payments to be made, things to be done, and conditions to be observed by the lessee, after the lease granted and during the continuance of the term; and it concludes thus: “As the gentleman aforesaid (the appellant) is not here at present, I shall, on his arrival, execute a document in detail on stamped cadjan in the manner dictated by him.”

On the face of the instrument, it is obviously a contract incomplete in itself and conditional; nothing in it binds the respondent to the granting of the lease, unless the money were procured for him from the appellant on his return to Madura; and it is clear also that nothing in it binds the respondent to advance the money, when he should return. Further it is obvious that no time being specified for this return, the parties must either by some collateral agreement have fixed a day for that return or must be taken to have contemplated, what the law would imply from their language, a return within a reasonable time, all the circumstances considered. For the respondent setting out his urgent necessities, showing the pressure that was on him, and professedly borrowing the money, not to meet future casual or uncertain expenses, but to liquidate the debts which occasioned the pressure then

upon him, it would be highly unreasonable to suppose that a return after any indefinite period, however long, could have been in the contemplation of the parties. And this conclusion is strengthened by the circumstance that there is no evidence of any previous authority from the appellant, constituting Narisahma his agent to make the contract; indeed, the instrument itself shows that he was not bound, that it was uncertain whether he would on his return adopt and ratify the act of Narisahma; and the conclusion is, therefore, irresistible, that the respondent was bound to wait only for that ratification and performance until the appellant's return on a specified day, or a return within a reasonable time.

The respondent contends that the time was fixed by a collateral parol contract, and limited to the 1st of November, or to eight days from the 25th of October; the appellant, that the return was to be within a reasonable time, that he did return within such reasonable time, and forthwith ratified the act of his agent, but that the respondent had in the meantime put it out of his power to fulfil the contract, by granting the lease to Fondclair. The undisputed facts of the case are these:—

On the 25th of October, the date of the agreement in question, the respondent executed the mortgage and bond to Narisahma as already stated. This appears to their Lordships to have been substantially part of the principal transaction, and to be most material on the point now under consideration; it was a loan of 1,000 rupees to meet one of the demands specified in the agreement, which may be presumed to have been peculiarly pressing, and the 1,000 rupees are stipulated to be re-paid on the 1st November, in default of which the mortgage of a single village was to take effect. Their Lordships think there is every reason for presuming that the re-payment was intended to be made out of the 19,000 rupees to be advanced by the appellant on his return to Madura; and if that be so, it is clear that his return was contemplated to take place on or before that day.

The next fact is that, on the 9th or 10th November, the lease was executed to Fondclair; and the remaining fact is the return of the appellant, on the 13th November, as their Lordships understand the evidence; this would be nineteen days after the execution of the agreement.

There is a good deal of parol evidence to the effect, either that a period of eight days, or that the 1st November, was agreed to specifically by the parties as the term beyond which the respondent was not to be bound to wait for the appellant's return; and their Lordships are disposed to give credit to the evidence: they do not think that the variation in regard to the eight days and the 1st November makes the testimony unworthy of belief. But it appears to them unnecessary to decide the case on this point: for they are clearly of opinion, looking at all the circumstances which appear on the face of the two documents, the *first* of which discloses the nature of the debts due from the respondent, which were mostly judgment-debts, or debts on which the execution was pending, or for which warrants had issued; and the *second* that a portion of the money contracted for was advanced at once, and to be re-paid on the 1st November; that it was understood by both parties that a reasonable time for the appellant's return would be within a few days; and that the delay of nineteen days was unreasonable. Such a delay would probably defeat the whole purpose of the loan; and there is not the slightest evidence that either by reason of distance, difficulty of conveyance, or the necessary or usual business of the circuit, a delay of nineteen days could have been considered probable.

On this ground their Lordships are prepared to recommend to Her Majesty that the appeal be dismissed; but as they do this on wholly different grounds from those relied on by the Court below, that the dismissal should be without costs.

The 15th June 1860.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge,
Sir L. Peel, and Sir J. W. Colvile.

Leave to appeal to Privy Council how to be regulated.

*On three petitions for leave to appeal in the following suits from judgments of
the Sudder Dewanny Adawlut at Calcutta.*

Maharajah Suteeschunder Roy,

versus

Guneschunder and others.

Ranee Surnomoyce,

versus

Maharajah Suteeschunder Roy,

Gooroopersad Khoond,

versus

Juggutchunder and another.

Leave to appeal to the Privy Council is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to 10,000 rupees, including interest up to the decree.

The grant of leave to appeal in cases where the specified amount of 10,000 rupees can only be reached by the addition of interest *subsequent* to the decree, is in the discretion of the Privy Council.

THE question in each of these three cases is, whether leave should be given to appeal to Her Majesty in Council. In one of the cases, application, as their Lordships understand, has been made to the Sudder Court for leave so to appeal, and the application has been refused; but in the two other cases no such application had been made.

Mr. Leith.—Will your Lordships excuse me? I should not wish to mislead your Lordships: it was not an application for leave to appeal to Her Majesty in Council, but an application to the Sudder, praying for the admission of a special appeal.

Lord Justice Turner.—Then in none of the cases has there been any application to the Sudder Court for leave to appeal to Her Majesty. The reason of there having been no such application to the Sudder Court in two, at least, of the cases is stated to have been that the Sudder Court has proceeded upon a certain rule as to cases in which leave should be given to appeal; and that according to the rules, on which they have proceeded, leave would not have been given in those two particular cases.

It is not very clear to their Lordships on what particular grounds the Sudder Court has proceeded with reference to giving or refusing leave to appeal. But their Lordships feel no doubt upon what grounds the Sudder Court ought to proceed in such cases. It is quite clear, in their Lordships' judgment, that the matter must be regulated by the order in Council of the 10th of April 1838, and by that order the Sudder Court are not to give leave to appeal unless the petition be presented within the time limited in the order, and unless the value of the matter in dispute in such appeal shall amount to the sum of 10,000 rupees at least, importing, therefore, that the leave to appeal is to be given in cases where the petition is presented within the prescribed period, and the value of the matter in dispute in the appeal amounts to the specified sum of 10,000 rupees.

Now, where the appeal is from the whole decree, and the decree has given an amount then actually including interest up to the decree exceeding 10,000 rupees, it is clear that the matter which is in dispute in the appeal, must exceed the sum of 10,000 rupees: for the question to be tried upon the appeal must be, whether the

decree is or is not right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding 10,000 rupees. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court, is an amount exceeding 10,000 rupees, there, in their Lordships' judgment, the case must clearly fall within the terms of the order in Council.

That, in their Lordships' understanding, disposes of the first and third of these cases.

The second case is somewhat different in its circumstances. It appears to be a case in which the party, applying for leave to appeal, claims to be entitled to an estate subject only to the payment of a fixed annual rent of 64 rupees; but the plaintiff in the suit, who is in possession of the judgment of the Court below, and would be the respondent upon the appeal, claims the right to set upon the estate any rent which he may think fit. In this case it appears to their Lordships, either that the value in dispute in the appeal must be considered to be 10,000 rupees within the meaning of the order, or if not, that it must be within the discretion of their Lordships whether leave to appeal should or should not be given. Taking the case to be within the meaning of the order, it is clear that the value of the matter in dispute will exceed the sum of 10,000 rupees; for, of course, an estate held at a rent of 64 rupees must be diminished in value to an amount far exceeding 10,000 rupees; if it be chargeable with a rent of 822 rupees, the amount of rent given by the decree. Their Lordships, however, do not think it necessary to decide whether the case falls within the meaning of the order or not. They think that, whether it falls within the order or within their discretion, the leave to appeal ought to be given.

Their Lordships have thus stated the reasons on which they have proceeded in these three cases, because they consider it of importance that the Sudder Court should understand the rules which ought to be proceeded on in giving leave to appeal, as a contrary practice on their part drives parties into this Court to obtain the leave. They desire, therefore, that the rules which have been mentioned should be observed; and are of opinion that in all these three cases leave should be given to appeal, and that in each case security should be given to the amount of 300%. Their Lordships must not, of course, be understood to intimate that the Sudder Court ought to give the leave to appeal in cases in which the specified amount of 10,000 rupees can only be reached by the addition of interest subsequent to the decree.

Such cases must, in their Lordships' opinion, rest in their discretion.

The 20th June 1860.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Mahomedan Law—Legitimacy—Marriage—Presumption.

On Appeal from the Supreme Court of Judicature at Madras.

Mahomed Bauker Hossein Khan Bahadoor,

versus

Shurfoonnissa Begum, an infant, by Syed Fareed, her grandfather and next friend.

According to the Mahomedan Law, the legitimacy or legitimation of a child of Mahomedan parents may be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

THE question in the present appeal from the Supreme Court of Judicature at Madras, between Mahomedans, is whether, upon the evidence in the case, the appellant ought to be considered as the lawful brother of Shasavar Jung Bahadoor,

that is to say, the lawful son of Oomdut Ool Oomrah, a Mahomedan, formerly Nawab of the Carnatic, the father of Shasavar Jung Bahadoor who, having survived Oomdut Ool Oomrah for more than half a century, died at Madras in the year 1856.

The point arose in a suit, in the Court already mentioned, for administering the estate of Shasavar Jung Bahadoor, the degree in which, dated the 9th February 1858, directed, among other things, a reference to the Master of the Court, to enquire and report whether the appellant was a brother of Shasavar Jung Bahadoor, and directed that, for that purpose, the appellant (not a party to the cause) should be at liberty to go before the Master.

The appellant, availing himself of this permission, carried in a state of facts and charges before the Master, which (contained in p. 10 of the Appendix) is in these terms :—

“That the Master was directed to enquire and report to the Court whether the said Mahomed Bauker Hoossain Khan Bahadoor is a brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named.

“That Shasavar Jung Bahadoor, the said intestate, was the son of Oomdut Ool Oomrah Bahadoor, Nabab of the Carnatic now deceased.

“That the said Oomdut Ool Oomrah Bahadoor, Nabab of the Carnatic, the father of the said Shasavar Jung Bahadoor deceased was, some three or four years prior to his death,* married, in the form usual amongst Mahomedans for performing Nicka-marriages, to one Ameen Sahiba *alias* Buddee Beebee.

“That the said Mahomed Bauker Hoossain Khan Bahadoor was the only issue of the said marriage, and was the son of the said Oomdut Ool Oomrah Bahadoor, Nabab of the Carnatic, by his Nicka wife the said Ameen Sahiba *alias* Buddee Beebee,† and is, therefore, the brother of the said Shasavar Jung Bahadoor, deceased.

“That the said Mahomed Bauker Hoossain Khan Bahadoor has, from the date of his birth up to the present time, been acknowledged, treated, and received by the Governor in Council in Madras, by the Nababs of the Carnatic, his relations, and by the late Shasavar Jung Bahadoor, deceased, in his life, and by his relations and friends as the son of the said Oomdut Ool Oomrah Bahadoor, Nabab of the Carnatic, and as the brother of the said Shasavar Jung Bahadoor, deceased.

“That the said Mahomed Bauker Hoossain Khan Bahadoor and Shasavar Jung Bahadoor, deceased, were, on the death of their father, the said Oomdut Ool Oomrah Bahadoor, Nabab of the Carnatic, on the representation of the family of the said Oomdut Ool Oomrah Bahadoor, the Nabab of the Carnatic, on the 29th day of September 1801, acknowledged by Lord Olive, then Governor of Madras, to be the sons of the said Oomdut Ool Oomrah Bahadoor, the Nabab, of the Carnatic; and a pension of 10,000 rupees was granted to each of them, the said Shasavar Jung Bahadoor, deceased, and the said Mahomed Bauker Hoossain Khan Bahadoor, as the Nicka sons of the said Oomdut Ool Oomrah Bahadoor, the Nabab of the Carnatic, deceased, which pension has since been and still is paid to the said Mahomed Bauker Hoossain Khan Bahadoor.

“That the said Mahomed Bauker Hoossain Khan Bahadoor has been admitted by the defendants Mayroon Nissa Begum and Madar Ool Oomrah Bahadoor to be the brother of the said Shasavar Jung Bahadoor, the former by her Counsel and Proctor on the hearing of the Ecclesiastical suit in the Supreme Court in which her right, as widow of the said Shasavar Jung Bahadoor, deceased, was established and declared, and by the said Madar Ool Oomrah Bahadoor in the late Nabob's Maukarnah Court, and in certain writings under his hand.”

The claim was opposed on behalf of the respondent the daughter and only child of Shasavar Jung Bahadoor, and evidence was adduced on each side in support of it and against it. Upon the whole of the evidence (it is set forth in the Appendix), the Master reported in the appellant's favor, finding that the appellant was the son of Oomdut Ool Oomrah, by “his Nicka wife” Ameen Sahiba, and was the brother of Shasavar Jung Bahadoor. But exceptions to the report were taken by the respondent, and, upon argument, decided in her favor by the Supreme Court; a decision that produced the appeal now before their Lordships, which was argued here fully and very well.

* Amended, this 15th April 1858, to “on or about the month of December.”

† Amended, this 15th April 1858, “and was born on the 10th June 1800.”

The exceptions and the order allowing them (which will be found in pp. 40 and 41 of the Appendix), are thus :—

“First Exception.—For that the said Master hath, in and by the said separate Report, rejected the Exhibit C. mentioned and set forth in his said Report, and offered as evidence on behalf of the plaintiff, in support of her state of facts and charge left in this cause on the 23rd day of April 1858; whereas the said Master ought not to have rejected such Exhibit C, but ought to have admitted it as evidence for the said plaintiff.

“Second Exception.—For that the said Master hath in and by the said separate Report, found that Mahomed Bauker Hoossain Khan Bahadoor is the brother of Shasavar Jung Bahadoor, the intestate, in the pleadings of this cause named; whereas the said Master ought to have found that the said Mahomed Bauker Hoossain Khan Bahadoor is not the brother of the said Shasavar Jung Bahadoor, deceased.

“Wherefore the said plaintiff doth except to the said Master's separate Report, and appeal therefrom to the judgment of this Honorable Court.

“The matter upon the exceptions taken by the plaintiff to the separate Report of Charles Martin Teed, Esq., the Master of this Honorable Court, dated the 10th day of June last, made in pursuance of the decree made on the hearing of this cause, and bearing date the 9th day of February last, coming on to be argued this present day before the Honorable the Supreme Court of Judicature at Madras, in the presence of Counsel learned on behalf of the said plaintiff and Mahomed Bauker Hoossain Khan Bahadoor; and the said Exceptions and Report being opened, upon debate of the matter on hearing what was alleged by the Counsel on both sides: This Court doth order that the said Exceptions be allowed, with costs of the proceedings had before the said Master, and of this application and order.

“By the Court.”

In the view that their Lordships take of the matter, the first exception is unimportant: for, whether the document to which it relates be considered or not, considered as part of the evidence, the conclusion as to the question of legitimacy must, according to their Lordships' opinion, be the same; and with regard to that question, their Lordships find it to be, if not established, at least highly probable, that the appellant who seems now to be between fifty-eight and sixty-two years of age, was born in the house of Chaittore Begum, a Nicka wife of Oomdut Ool Oomrah; and it appears to be clear that he (the appellant) is the son of a woman who was as a protégée, or dependant, if not a servant, of that lady. She seems to have brought up the appellant's mother Ameen Sahiba, mentioned in the Report, and to have taken an interest in her. It appears likely that Ameen Sahiba, from a time preceding her adolescence, until the death of Chaittore, had no other home than the residence of Chaittore, and that Oomdut Ool Oomrah, whether legitimately, or illegitimately, was the father of the appellant, and so, from the time of his birth, reputed generally to be; their Lordships, by using the term “reputed generally,” not, however, meaning to affirm or deny that there ever was any acknowledgment of the paternity by Oomdut Ool Oomrah. He (Oomdut Ool Oomrah) died before the year 1802, and was survived for several years by Chaittore. She was survived for several years by Ameen Sahiba, and since the death of Ameen Sahiba some years have elapsed.

More than once in the proceedings before us, Ameen Sahiba is described as a slave. Their Lordships, however, believe, and it has been, by the Counsel on each side, at the bar, expressly and distinctly admitted that she was not so. Their Lordships, accordingly, for every purpose of the present litigation, assume that Ameen Sahiba, during her whole life, was free.

Chaittore, who seems not to have had any child of her own, appears to have adopted the appellant from the time of his early childhood, if not from the time of his birth, and thenceforth during the whole of her life to have treated him as her son; and both the appellant and his mother lived continually, as it seems, with Chaittore until her death—the appellant from his birth, his mother from a time preceding that event. The appellant's examination in support of his state of facts, contains but an indistinct and indirect, if it contains any allegation that his mother was the wife of Oomdut Ool Oomrah.

Proceeding on the basis of these remarks, their Lordships deem it necessary or convenient now to divide the evidence into two portions: the *first* consisting of the testimony of two widow ladies, named Shurfoon Nissa Begum and Fakroon Nissa Begum (pp. 12, 13, 14, Appendix), and the *second* consisting of all the rest of the evidence; and to consider the second portion previously to consider the first; and in considering the second portion, to deal with it as if the first were not existing. So viewing the evidence, their Lordships are of opinion that what has just been described as the second portion of it is insufficient to support the appellant's contention that he is the legitimate or legitimated son of Oomdut Ool Oomrah. By the second portion of the evidence it is not shown that there was at any time a ceremony of marriage between him and Ameen Sahiba, or that she at any time claimed or professed or represented herself to be his wife or widow, or was at any time acknowledged by him as his wife, or was by the Government or otherwise at any time recognized or treated as his wife or widow. Though five other ladies, as his widows, had allowances from the Government, she had none.

The case, too, thus regarded, there is no proof that Oomdut Ool Oomrah at any time treated, recognized, or acknowledged the appellant as his son, and it does not (we think) help the appellant that soon after his alleged father's death, the appellant, as a member of Oomdut Ool Oomrah's family, had a pension from the Government which the appellant still enjoys, and which there seems to their Lordships to be no reason in point of justice, fairness, or propriety, why he should not continue to enjoy. That pension was, with the assent and concurrence of the family of Oomdut Ool Oomrah, certainly allotted to the appellant, then a minor, in very early childhood, as a son of Oomdut Ool Oomrah, but also as the son of Chaittore, which, by adoption, though by adoption alone, as already mentioned, the appellant was: nor can he, in our opinion, be taken to have had, or to be enjoying, any Government pension or Government allowance whatever, in the character of a son of Ameen Sahiba. It was for the pecuniary interest of Chaittore, with whom the mother and the son were living, to represent the appellant as Chaittore's son, and if Ameen Sahiba was not a widow of Oomdut Ool Oomrah, it was for her interest also, and that of the appellant, that he should not be represented as her son. Their Lordships are of opinion that unless the testimony, forming what their Lordships term the first portion of the evidence, ought to be deemed credible and of some weight, the appellant's claim fails. Is then, Shurfoon Nissa Begum, or Fakroon Nissa Begum, a credible witness? They have deposed thus:—

"Shurfoon Nissa Begum, a widow, residing at No. 25, in Amyapah Moodelly Street, at Royapettah, within the local limits of Madras, produced, the 19th day of April 1858, for examination before the Master in support of the state of facts and charge of Mahomed Bauker Hoossain Khan Bahadoor, left in this cause having been first duly sworn, said: I know Mahomed Bauker Hoossain Khan. I knew his mother and father, who was my brother. There was a girl inside the house; he married her by Nicka. The Nawab Oomdut Ool Oomrah married by Nicka Ameen Sahiba. Some time after the Nicka marriage, Bauker Hoossain was born. Immediately on the birth of the child he was given in adoption to Chaittore Begum. I was present at the Nicka. The Nicka was read outside. The people came in, tied a Lutchā and put a nose ornament. The Lutchā was tied on Ameen Sahiba, and the nose ornament was put on her; I cannot say who by, there were so many persons present. I do not know if any of the people are alive except us two. After the Nicka ceremony Oomdut Ool Oomrah and Ameen Sahiba lived as husband and wife. After Bauker Hoossain Khan's birth, Ameen Sahiba was in the Chaittore Begum's house. Bauker Hoossain Khan has been treated by myself as my brother's son, as my nephew. I knew Shasavar Jung; he was the son of my brother Oomdut Ool Oomrah. Shasavar Jung's mother was Koolsoon Begum, who brought him up, and Bauker Hoossain was brought by Chaittore Begum.

"*Cross-examined by Mr. Wilkins.*—Ameen Sahiba was a child of a poor man: I do not know his name, Ameen Sahiba was not a slave girl in the family; she was the child of a poor nobleman who, being unable to support his child, gave the child to be supported by Chaittore Begum. I know this because we were in the habit of going to Chaittore Begum's house, and she in the habit of coming to us. Upon asking Chaittore Begum, she said it was a poor nobleman's child, and I bring her up. She did not say who the poor nobleman was, and we did not ask. I was present when the Nicka took place. I was not in the Dewanah Khanah when the

Nicka was read and took place. I was among the assembly of the females. Ameen Sahiba died lately, about seven or eight years ago.

Re-examined by Mr. Ritchie.—Ameen Sahiba lived in Chaittore Begum's house up to the time of her death.

Examination of Fakroon Nissa Begum.

"Fakroon Nissa Begum, a widow, residing at No. 16, Vencatachellum Chetty Street, at Triplicane, within the local limits of Madras, produced the 19th day of April 1858, for examination before the Master in support of the state of facts and charge of Mahomed Banker Hoossain Khan Bahadoor left in this cause, having been first duly sworn, saith : I know Mahomed Banker Hoossain Khan Bahadoor. I knew his mother ; she was called Ameen Sahiba, but commonly known by the name of Budde Beebee ; she married Oomdut Ool Oomrah by a Nicka ceremony. Oomdut Ool Oomrah was my brother. I was present at the ceremony. This was many years ago. It took place in the Chepauk Garden. I cannot say when Mahomed Banker Hoossain Khan Bahadoor was born, but he was about a year or a year and a quarter old when his father died. I knew the late Shasavar Jung Bahadoor ; he was my nephew ; he was the step-brother of Mahomed Banker ; when they were young, they were received as brothers and played together ; when they grew up, they remained separate. Mahomed Banker was brought up by Chaittore Begum, who was the mother of Shasavar Jung. Mahomed Banker was born after the Nicka marriage of Ameen Sahiba. Oomdut Ool Oomrah used to call the child to him, see it and caress it, and treated him as he did Shasavar Jung. Mahomed Banker has been received by myself and other members of Oomdut Ool Oomrah's family as his son.

Cross-examined by Mr. Wilkins.—I am seventy-five years old. Ameen Sahiba was the daughter of a poor woman, who was not a slave girl. I do not know who the father of Ameen Sahiba was. I do not know if the Cauzee was present at the time of the Nicka marriage. The ceremony took place outside, and the ladies were all collected inside of the house on occasion of the ceremony. I was in the assembly. I saw the Nicka was read ; it was read in the Dewan Khanah ; afterwards the people came where the ladies were and congratulated each other. I was not present in the Dewan Khanah when the Nicka ceremony was read. After this was read outside, the people came in where the ladies were, and tied the Lutchah and put the Nuttoo. The Nuttoo was put in the nose of Ameen Sahiba ; I do not recollect who did this. The Lutchah was tied on the neck of Ameen Sahiba ; I do not recollect who tied the Lutchah. Before her marriage Ameen Sahiba was a Mussulman's child, a poor man's child ; and was brought up in the house of Chaittore Begum. Ameen Sahiba is dead ; she lived many years after Mahomed Banker's birth. I do not know anything more of the Nicka than I have said. I know nothing about the dowry.

Re-examined by Mr. Ritchie.—I did not hear the Nickaread. Ameen Sahiba was inside the Zenanah with the females during the whole of the marriage ceremony. Ameen Sahiba was of marriageable age at the time of the ceremony. After the ceremony Ameen Sahiba lived in the house of Chaittore Begum. Chaittore Begum was the wife of Oomdut Ool Oomrah."

Whatever may have induced the ladies to give this testimony, their Lordships find themselves unable to credit it. They think it very highly improbable that if a ceremony of marriage between Oomdut Ool Oomrah and the appellant's mother of any such kind as that stated, or of any kind, had taken place with such a degree of publicity as that alleged by the two ladies, or with anything like it, the fact would not have been proved also by some other witnesses or witness, notwithstanding the lapse of time. Nor do their Lordships believe that Chaittore or Ameen Sahiba would so have conducted herself, or so acted as they respectively appear to have done, if there had been any such marriage. The conduct of both is so strongly opposed to the notion of a marriage between the protégée, dependant, or servant, and the husband of the protectress, patroness, or mistress, as to render it impossible for their Lordships to think that such a marriage took place, upon the foundation merely of the evidence before them. Why had not Ameen Sahiba, why did she not claim, a house or establishment of her own ? Why did she continue in that of Chaittore ? Why not have, why not claim an allowance from the Government ? Why concede, as she seem to have conceded, her son to Chaittore ? Why rest contented, or discontented in the humble and dependent, and almost, if not altogether, ignominious position in which she remained, when five wives of the Prince (her husband as now alleged) has establishments and allowances agreeing with his rank ? Their Lordships think that not a single portion of the evidence of either of these two ladies can be trusted, and, if that is so, there is (it cannot be necessary to repeat) no proof that Ameen Sahiba was ever married, nor

proof that she ever represented herself as a married woman, or, as a widow, nor proof of any acknowledgment on the part of the alleged father by word or deed, by language or conduct, that he was her husband, or the father of her son.

Their Lordships, therefore, hold that the judgment under appeal is right, unless as to costs. But, in arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation.

Here there is, in their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.

With regard to costs, however, their Lordships do not impute to the appellant either wilful or corrupt perjury, or subornation of perjury; and, therefore, not merely from the Master's opinion, but from the circumstances of the case also, they consider the appellant's claim, though untenable, so accusable that they will humbly recommend to Her Majesty that the appellant should not be subjected to any cost (except his own) of the proceedings before the Master, or of those before the Supreme Court; that the order before them should so far, and only so far, be varied; and that there should be no costs of the present appeal.

The 25th June 1860.

Present :

Lord Kingsdown, the Judge of the High Court of Admiralty, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Limitation—Recovery of costs by E. I. Co. for prosecuting Appeals by virtue of the 3 and 4 Wm. IV c. 41.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

The Government of Bengal,

versus

Shurufftoonissa and another.

Suit for the recovery of costs incurred by the Government of Bengal in virtue of the Statute 3 and 4 Wm. IV. c. 41, authorizing the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing.

The admission by a defendant that a demand was claimable from some quarter or other, but not as against the property in question, is not an admission within the meaning of Regulation III. of 1793, excepting a suit from limitation under that Regulation.

The Government having been expressly warned that the proper course to adopt for the recovery of the costs was to commence a regular suit, and not to proceed in a summary mode, and having neglected for 13 years to take that course, no "good and sufficient cause" precluding them from obtaining redress according to the exception provided by the aforesaid Regulation could be presumed to justify the exemption of their suit from limitation.

The recovery of these costs does not constitute "a public right" within the meaning of Regulation II. 1805, enabling the Government to sue notwithstanding the lapse of time.

It will be necessary in this case merely briefly to advert to some of the circumstances which have given rise to the questions discussed at the bar. It appears that there was a suit of very old standing; of such great antiquity that even the parties do not attempt to state at what period an appeal to His late Majesty in Council was lodged against a decision of the Court of Sudder Dewanny Adawlut at Calcutta. Some time prior, however, to the year 1833, an appeal had been preferred by Shah Assud Oollah, the father of one of the present respondents, against Mussumat Emamun, as respondent.

In virtue of the Statute* that was passed, giving authority to the Crown to appoint the East India Company to take charge of appeals and bring them to a hearing, the cause was heard; the appellant was condemned in costs; and the decree of the Court below was affirmed. Previous to the hearing it seems that Shah Assud Oollah had died. It does not appear from any of the proceedings in this case that the present respondent (his son) had anything to do with that appeal whatever individually; but his father having been condemned in the costs, proceedings were taken against the son, as possessing the property of his father, for the realization of the sum due for costs.

In the year 1837 the first proceedings in the present case were adopted, and the mode of proceedings was this:—The East India Company, in virtue of the rights they had acquired to recover the costs, proceeded against the son, and also against the wife. They proceeded for the purpose of rendering certain property, which was claimed by the wife as having been conveyed to her by deed of gift of her husband, amenable to the payment of those costs. These proceedings went on, and by a decree of the Zillah Judge, which was made on the 29th December 1837, a sale of half the real property of Shah Enaet Hossein was directed to be made, But Mussumat Shurrufutoonissa was dissatisfied with this order, and appealed to the Court of Sudder Dewanny Adawlut, and, on the 31st of January 1839, the Court reversed the order of the Zillah Court, and ordered all the property comprised in the decree of the Court below to be released, upon the ground that no summary order could, in the existing state of things, disturb her possession.

Now, it is important to see what was really the tenor of that order, as set forth in the judgment of the Court of Sudder Dewanny Adawlut, which states the facts more particularly. It appears that this property had been registered in the Collectorate in the name of the respondent; that it had been alleged to have been given up by deed of sale in lieu of dower; and that she had, rightly or wrongly, obtained a decree on the 17th May 1830, in her favor. Now, the Sudder Adawlut in that case very clearly intimated what was the state of things, namely, that it was impossible that the order of the Judge of the Court below could be affirmed, because the only mode of proceeding was that which they directed her to adopt, namely, to proceed regularly to bring the property to sale, and no summary order disturbing her possession could be passed.

This took place, as has been stated, on the 31st of January 1839, and no further proceedings were taken on the part of the Government to realize the payment of these costs by means of the sale of this particular property, until the year 1852, after the lapse of thirteen years. When this case came to be prosecuted after the year 1852, the only objection we need notice, was an objection made on behalf of the present appellants, that the suit could not be brought on account of its being barred by the Statute of Limitations.

We will address our attention, therefore, to that question at once.

Two Statutes of Limitation have been adverted to by the Counsel for the parties before us, namely, Regulation III. of 1793, and Regulation II. of 1805. Assuming that it was possible that this suit might be governed by Regulation III. of 1793, Mr. Forsyth raised a question that it was excepted, by virtue of certain words found in that Regulation, from the operation of that Statute itself, without reference to Regulation II. of 1805; and he stated that the money had been demanded from the appellants for the matter in question; and that the defendant admitted the correctness of the demand. Now, that the money was demanded may be perfectly true, and that the defendant might have admitted that the demand was claimable from some quarter or other, may be perfectly true; but that, according to the intent or meaning of the words of the Regulation, he admitted that there was a

* 3 and 4 Wm. IV. c. 41.

claim as against the property in question, there certainly is not one atom of evidence before their Lordships.

Their Lordships think, therefore, that that Clause in the first Regulation can have no operation upon this case.

Let us, then, consider the second question. There is an exception, "when, either from minority or other good and sufficient cause, he had been precluded from obtaining redress." I will not say that "other good and sufficient cause" are not words so comprehensive that they might, by possibility, extend to anything that may, in the ordinary meaning of these words, constitute a good and sufficient cause; but is there any good and sufficient cause upon the present occasion? Here in the month of January 1839, there in an express warning given to the Government, who had then sought to make this property amenable to the costs that the proper course was to commence a regular suit, and not to proceed in a summary mode. They had the proper course pointed out to them; they pointed out to them the only course by which they could make this property amenable; and they neglected for the whole period of thirteen years to take any such measures. It is, therefore, quite clear, giving the most extensive meaning to the words, "other good and sufficient cause," that it is impossible to say that, "either from minority or other good and sufficient cause," they were precluded from obtaining redress.

We now come to what is certainly a very important point, namely, whether Regulation II. of 1805 extends to the present case, so as to enable the Government to sue, notwithstanding the lapse of time. Undoubtedly, the great object of that Regulation of 1805 was to prevent vexatious suits, in consequence of the litigiousness that generally prevailed among the natives of India, and in all probability, it was not intended at that time to embarrass the East India Company, or the Government of India. But, be that as it may, Regulation II. of 1805 expressly declares that this Statute of Limitations should not be considered applicable to any suit for the recovery of public revenue, or for any public right or claim whatever, which might be instituted by or on behalf of Government, with the sanction of the Governor-General in Council, or by direction of any public officer or officers who might be duly authorized to prosecute the same on the part of Government; or, *secondly*, to any claims on the part of Government, whether for the assessment of land held exempt from the public revenues without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment, or *for any other public right whatever*.

Now, the question turns on the meaning that ought properly to be attached to these words, "*any other public right whatever*." Perhaps it would be too strict a construction to say that these words shall be construed precisely to be *ejusdem generis* with those matters which are mentioned before, namely, "the assessment of land held exempt from the public revenue without legal and sufficient title to such exemption, or for the recovery of arrears of the public assessment;" but although they may not be construed with that degree of strictness, yet they must be taken to depend upon the same principles, otherwise the word "public" would have no meaning.

This brings us to the consideration of the question whether the recovery of these costs does or does not constitute a public claim. The Statute has been read, and we need not go through it again; but by virtue of that Statute His Majesty in Council might give such direction as he thought fit to the United Company, or other persons, for the prosecution of these suits, and also might make such orders for security for, and for the payment of, the costs as His Majesty in Council should think fit. Accordingly, it appears that an order in Council was issued with a view to carry into effect this Statute, and that order in Council directed the East India Company to appoint Agents and Counsel for the different parties in the appeals then pending, to do all such matters and things as had been usually transacted and done by agents in the prosecution of appeals. Now, we are of opinion that these were all private acts between individuals, and,

that they had not originally in their nature any thing of a public character to be ascribed to them. It appears that His Majesty, by another order in Council, directed that the Company should be entitled to demand payment of their reasonable costs of bringing appeals to hearing by virtue of the Act, to such amount and from such party and parties, and should have a lien for the said costs on all money, lands, goods, and property whatsoever, which might be recovered in such appeal, and upon all deposits which might have been made, and all securities which might have been given in respect of such appeal. In other words, that order in Council placed the East India Company in precisely the same place and position as the winning party would have been in, if the appeal had come on in its ordinary course. It appears to their Lordships that the nature of this transaction was originally of a private character. It continued to be of a private character, and the only distinction that can be drawn is this, that the East India Company are the agents to assert the right of the originally successful party to the costs incurred in the appeal.

It has been observed in the course of this discussion that other persons might have been appointed, and nobody can for a moment say that, if it had pleased His Majesty in his wisdom to appoint anybody else to conduct these proceedings and to realize the costs, the parties so appointed would not have sued as private individuals. It pleased His Majesty, however, to appoint the East India Company. Can the appointment of one particular agent change the whole character and nature of the transaction from beginning to end, and convert that which was originally a private transaction, and nothing but a private transaction, into a transaction of a public character so as to bring it within the terms of the Regulation on which we have commented.

Their Lordships are of opinion that the decision of the Court below was right and legal, and they will, therefore, humbly recommend Her Majesty to affirm that decision, with costs.

The 15th July 1860.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colville.

Appeal to Privy Council—Dismissal of, for default of prosecution—Restoration of.

On petition to restore an appeal from a decree of the Sudder Dewanny Adawlut at Calcutta.

Ranee Birjobuttee and others,

versus

Pertaub Sing, Government, and others.

Application for restoration of appeal acceded to, in consideration of the interests of infants being involved in the case, and with reference to the state of that part of India where the matter arises in, after 1857, on condition of the deposit of further security, and of the prosecution of the appeal within a certain time.

The security in India was held to have gone by the dismissal of the appeal for default of prosecution.

THE decision proposed to be brought under appeal was ripe for appeal in the year 1856, if not in the year 1855, and the delay in various ways has been so considerable that, notwithstanding the state of India, especially that part of India where this matter arises, in and since the year 1857, it is probable, to say the least, that if Mr. Baboonaus's personal interests had been alone concerned in this matter, the application now made would have been wholly unsuccessful. Their Lordships, however, cannot but give some degree of attention to the circumstance that there are infants concerned whose interests were confided to him. Now, their Lordships do

not mean to go to the length of saying that where infants are concerned any degree of delay may be considered justifiable or excusable, or such as may be passed over: there may be circumstances so strong as even to prevent infancy from being an apology or an excuse. Their Lordships, however, after much consideration, do not view the present case in that light, and considering the apology or excuse of infancy, and considering the manner in which the interests of minors are involved, and the state in which the part of India from whence the case comes was, in and after the year 1857, their Lordships are of opinion that on certain terms this application may be acceded to.

The applicant, their Lordships think, must pay the costs of the present application. The applicant, their Lordships think, must find security, that is, find a deposit to the amount of 600*l.*, to be made on or before the 1st December next, and he must undertake to have the appeal set down so as to be in their Lordships' list for hearing at the sittings after Hilary Term next.

Mr. Rolt.—That will enable us to communicate with India.

Lord Justice Knight Bruce.—One of their Lordships' reasons in thus deciding has been that the security in India is gone by the dismissal of the appeal. Security was given, I think, to the amount of 4,000 rupees in India; that is gone: therefore, if that money were deposited, you would be able to get it back.

Mr. Rolt.—I was not aware that it would have actually gone by the dismissal of the appeal.

Lord Justice Knight Bruce.—Upon that footing we fix the amount of 600*l.* on the hypothesis that that security is gone, and that you will obtain it back.

Mr. Rolt.—If that security stands it would be 200*l.* in addition: that would answer your Lordships' purpose.

Lord Justice Knight Bruce.—That, I suppose, would be so, if that security stands; but we do not think it can stand.

Lord Justice Turner.—I do not see how it can stand.

Lord Justice Knight Bruce.—The authorities in India may be informed that we proceed upon the hypothesis that you will be entitled to have that money back.

Mr. Rolt.—Yes, I am much obliged to your Lordships.

The 18th July 1860.

Present:

Lord Kingsdown, the Judge of the High Court of Admiralty, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colville.

Agreement by third party to pay for another—Bona fide endeavour of the obligor to perform his engagement—Disposition of Obligee to prevent performance—Interest.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Ram Gopal Mookerjee,

versus

Masseyk and Kenny.

Where a third person voluntarily consents to incur liability on account of another, and binds himself in a penalty for the due performance of his engagement, the nice technicalities of English Law are not applicable, but the real intention of the parties must be looked to. In this case, there having been a *bona fide* endeavour on the part of the respondent fairly to perform his engagement, and there having been a disposition on the part of the appellant to throw obstacles in the way of the performance in order to obtain payment of the penalty consequent on non-performance, the appeal was dismissed.

It appeared that there was an interval of several months during which time no interest was calculated. The Privy Council, although inclined to believe that the interest was due, yet finding that the point was not stated in the reasons of appeal laid before the Sudder Court, and that it did not appear to have been suggested below, disallowed it. The sum would probably have been allowed if it had been asked; and if it had been refused, the amount would have been far below that for which an appeal to the Privy Council could be brought.

THIS is a suit brought by the appellant to recover 12,829 rupees alleged to be due to him from the respondents under an ekrarnamah or agreement.

It appears that the appellant was the lessee of certain lands in the zillah of Jessore, and that the respondent Kenny, who was the proprietor of several Indigo Factories in that district, was under-lessee of a portion of the property.

The appellant alleged that a large sum was due to him from Kenny for rent, and he brought several actions in the Zillah Court of Jessore to recover the amount, and issued attachments against Kenny's factories and other property.

In 1850, while this litigation was pending, the other respondent Masseyk intervened and alleged that he had become the purchaser of the interest of Kenny, and he objected to any sale being made under the attachments.

He obtained an order to stay the sale under four of the attachments, from which order the present appellant appealed to the Sudder Dewanny Adawlut, and that appeal was pending at the time when the engagement on which the question before us was raised, was entered into by Masseyk; besides which three other execution of decree cases were pending for trial in the zillah, and other actions were brought by Masseyk against the appellant.

In this state of things the instrument in question was executed by Masseyk on the 25th September 1850.

It is in the Bengalee form and language, and is addressed by Masseyk to the appellant. It recites the circumstances already stated, and that Masseyk was desirous of coming to an amicable settlement for the money due to the appellant; that the amount due to the appellant from Kenny had been proved to be 33,589 rupees 15 annas 3 pice, and of which under an amicable settlement Masseyk had agreed to pay to the appellant 25,000 rupees, and that the appellant had agreed to receive the said sum and make a remission.

The agreement then states that certain sums had already been received by the appellant in part of the 25,000 rupees; that, at the time of the execution of the instrument, 10,000 rupees more had been paid to the appellant through his mook-tear, leaving 12,713 rupees; and that Masseyk agreed to pay this sum, with interest, from the 1st Bhadoon (16th August 1850) by two instalments, one of 6,000 rupees, for principal, on the 10th Magh (22nd January 1851), and the other of 6,719 rupees, for principal, on the 10th Choit (23rd March 1851). In what way the interest was to be paid, we will consider presently. The payments were to be endorsed on the back of the ekrar; then follow these words:—"And whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal."

The factories are then pledged for the payment of this money, as well as the personal liability of Masseyk. Then follow these words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the amicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated Factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said Factories from the said purchaser."

Provision is then made for putting an end to the several suits subsisting between the different parties.

It is to be observed that, although the debt from Kenny to the appellant might be 33,589 rupees 15 annas 3 pice, it by no means followed that the property which Masseyk had purchased was liable to the payment of the whole of that sum; and, whatever might be the liability of the property, Masseyk was, previously to this agreement, under no personal liability. By the agreement he made himself personally liable to the extent of 25,000 rupees for the debt of another; of which sum nearly half was actually paid at the time; and these payments made and to be

made were part of an arrangement for a general settlement of the various disputes then pending between the parties, and for the dismissal of the suits.

There is nothing in the agreement which makes to the payment of the instalment on the days fixed of the essence of the contract, unless that stipulation is to be inferred from the words, "If I fail to pay agreeably to the condition written."

Instead of there being in any other part of the agreement anything to favour this construction, the nature of the engagements on each side, and the clause to which we have referred as to any payments on account being applied first to payment of interest, appear to us to furnish an implication to the contrary.

It being a part of the agreement that the suits in the Zillah Court and the Sudder Dewanny should be abandoned, the vakeels of both parties, on the day of the date of the agreement, brought it under the notice of the Sudder Dewanny by petition. It was also, on the same day, brought to the notice of the Zillah Court.

The first instalment of 6,000 rupees became due on 22nd January 1851 : it was not actually paid till the 21st of March 1851.

The second instalment became due on the 23rd March 1851, and was not received by the appellant until 5th July 1851. Under these circumstances, the appellant has brought his action against Masseyk and Kenny, insisting that the agreement has not been performed according to its tenor, and that he is, therefore, entitled to receive the payment of the whole amount of 8,000 and odd rupees, which, he says, were only to be remitted on the condition of the less sums being paid punctually on the specific days mentioned in the agreement.

On the part of the respondent it is contended that payment on the day was no essential part of the contract ; that this is not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctually at fixed periods in which case the punctuality of payment is the only consideration which the creditor receives for his indulgence ; that this case does not, therefore, fall within the principle of Ford and Lord Chesterfield relied on by the appellant, but is a case in which a third person being under no liability, consents to incur that liability, and binds himself in a penalty for the due performance of his engagement.

The Judges of the Zillah Court, and all the Judges of the Sudder Court, have decided against the claim of the plaintiff, the present appellant ; and their Lordships have to consider whether any sufficient reasons have been urged for disturbing those decisions.

Their Lordships are of opinion that they ought not to apply to this case the nice technicalities of English Law, that they must look at the agreement with a view to see what the real intention of the parties was, and must enquire whether it appears upon the evidence that there has been any failure by the respondents in the substantial performance of the contract ; and if there has been any default to whom such default is attributable.

It appears to their Lordships to be sufficiently proved that on the 10th Magh the respondent Masseyk, through his mooktear, offered to pay to Deb Coomar Rae, the mooktear of the appellant, in the Zillah of Jessore, the sum of 6,000 rupees as the first instalment due under the agreement, and that Deb Coomar Rae declined to receive it, alleging that he had not in his possession the ekrarnamah on which the receipt of the money was to be endorsed. This instrument is said to have been in the possession of the appellant himself, who resided at some distance from Jessore.

It is objected, on the part of the appellant, to this offer—

1. That the offer did not include the interest which ought at that time to have been paid ;

2. That Deb Coomar Rae had no authority to receive the money on behalf of the appellant ;

3. That the respondent was bound to seek out the appellant on the day of payment, and to tender to him the exact amount of principal and interest then due.

Their Lordships, on consideration, are of opinion (contrary to the impression which they at first entertained) that, by the agreement, the interest on the 12,719 rupees, up to the day of payment, was to be paid at the same time with the 6,000 rupees, and that, therefore, if it were necessary to prove a strict legal tender, such tender was not made; but they are satisfied that the omission to include the interest arose merely from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused, and they think that a strict legal tender was not necessary.

2. They are by no means satisfied that Deb Coomar Rae had not authority to receive the money. He has not been examined by the appellant, and he was summoned as a witness by the respondent and he failed to appear. He was the person through whom, if the attachments against the property had been prosecuted, the money would have been recovered, and to whom it would have been paid in the Zillah Court; and he was, therefore, the person to whom the respondent might well imagine that the ekrarnamah, on which the payment of the money was to be endorsed, would be transmitted by the appellant. There seems no improbability in the statement of the respondent's witnesses that Deb Coomar Rae said that he would send for the ekrarnamah that the endorsement might be made upon it.

3. There seems to have been uncertainty on both sides as to the place at which the ekrarnamah was to be produced and the money was to be paid. The instrument was executed at Calcutta, where the appellant had a mooktear; it related to property at Jessore, where the appellant had another mooktear. The deed had been sent from Calcutta to be produced in the Zillah Court of Jessore. The appellant resided at Beernuggur, and had a place of business at Kishnuggur. It is stated by the respondent that it was verbally settled, after the execution of the ekrar, that the money should be paid to the appellant's mooktear in the Zillah of Jessore, and that appellant would send the ekrar to him. There is, however, no proof of this. On the other hand, the appellant does not allege that there was any place fixed, either by agreement or by custom, or by rule of law, where the payment should be made. He suggests indeed, at different times in the course of the proceedings, that the payment or tender might have been made to his mooktear at Calcutta, or to himself at his house at Beernuggur, or to the house of the malzemindar of the ijarah. To these the place of business of the appellant at Kishnuggur was added in the discussion at our Bar as a proper place for making the tender.

Upon the whole their Lordships are satisfied that there was a *bond fide* endeavour on the part of the respondent fairly to perform his engagement, and that there is much reason to believe, with some of the Judges in the Court below, that there was desire on the part of the appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance.

The principle of these observations applies to the second instalment as well as the first; and their Lordships have arrived without hesitation at the conclusion that the main ground of the appeal entirely fails, and that if the appellant has received the full amount of the principal sum of 12,719 rupees, with interest upon that sum till the time of payment, he has received everything which he can justly claim.

They are not, however, satisfied that he has received the full amount of interest which he might reasonably demand; because it appears that, with respect to the last instalment, there was an interval of several months, during which time no interest was calculated, the delay of payment during that period have arisen, as it is suggested, from the accidental absence of the European Judge from Jessore. It appears, however, that this point is not stated in the reasons of appeal laid before the Sudder Court, nor does it appear to have been suggested below. The sum would, probably, have been allowed if it had been asked; and if it had been refused, the amount would have been far below that for which an appeal to this country can be brought.

Under these circumstances, their Lordships think they would not be justified in modifying, on this ground, the order which they must humbly advise Her Majesty to make, *viz.*, an order that this appeal be dismissed with costs.

The 30th July 1860.

Present :

Judge of the High Court of Admiralty, Sir E. Ryan, Sir J. T. Coleridge,
and Sir L. Peel.

Action—Tort.

On Appeal from the Supreme Court of Judicature at Fort William in Bengal.

Thomas Eales Rogers,

versus

Rajendro Dutt and others.

In the case of damage occasioned by wrongful act, (*i. e.*, an act which the law esteems an injury) the same remedy by action lies against the doer, whether the act was his own spontaneous and unauthorised or whether it was done by the order of Government. Malice is not a necessary ingredient to the maintenance of the action. It is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests, is not enough.

The Government may prohibit its pilots from allowing any vessels under their pilotage charge to be taken in tow of a Steamer, the owners of which will only render their services on exorbitant terms.

THIS was an appeal from the Supreme Court of Calcutta. The respondents were the plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been, and then were, the owners of a steam-tug called the *Underwriter*, employed for hire in towing ships to and from the port of Calcutta, and in the receipt of large profits from such employment; and that the defendant was an officer in the Public Service of the East India Company, having the name and style of the Superintendent of Marine, and that, as such, he was invested with the chief authority and control over all the officers of the Bengal Pilot Service, employed by the Company on the Hooghly River for the purpose of piloting vessels thereon to and from the said port; and that the said officers of the Bengal Pilot Service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward-bound ships; and that, in consequence of the perils of the navigations, no ship can with safety proceed inwards and outwards, or be duly navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the defendant wrongfully and unjustly contriving and intending to injure the plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order, addressed to the said officers of the Bengal Pilot Service, whereby he, as such Superintendent of Marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at 20,000 rupees. To this plaint the appellant pleaded three pleas: on the first only of which, being the plea of not guilty, the question before their Lordships arises. The allegations in the inducement by way of recitals must be taken to have been admitted by the defendant: and supposing the direct allegations which are in issue to have been proved in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded. The point for consideration, therefore, is whether upon the evidence in the case this action is maintainable.

As their Lordships view the evidence, the facts appear to be the following:—The Bengal pilots are an organized body under the control of the Superintendent of Marine, which office, at the time in question, was filled by the defendant. They

form by far the larger part of the Calcutta pilots, and on them devolves the almost indispensable duty of piloting vessels up and down the Hooghly to and from the sea and port of Calcutta. Tugs are constantly required for bringing vessels up: and the plaintiffs were owners of one, a steam-tug, the *Underwriter*, employed in this service. For such service there are two rates of payment, one called the Government Certificate, in which the amount is regulated by a tariff according to the time employed; the other depending on the special contract between the parties. On the 20th September 1857, when the mutiny in India was in full vigour, Her Majesty's ship *Belleisle* entered the Hooghly bringing troops for the Public Service. The Captain of the *Underwriter*, Henry Fox, who was seeking employment, went on board and offered to take her up. At this time a Bengal pilot was in charge of her. Fox declined to take her on the terms of the Government Certificate, and asked a much larger sum, first 3,000 rupees, and finally 2,500. The Captain, not choosing to incur the responsibility of agreeing to this demand, telegraphed once and again to Mr. Beadon, the Secretary to the Government of India, stating, on the second occasion, the demand, that his pilot required a powerful tug, and asking what amount he might offer. On the receipt of this second application, Mr. Beadon communicated it to the defendant, with a letter stating what had passed, and concluding with these words,—“what had better be done?” The defendant immediately went to Mr. Beadon, and gave him his opinion that the charge was exorbitant: that it was Mr. Beadon's duty to take steps to prevent such charges being made for ships coming in with troops; that the rate of charge might otherwise increase from day to day with the increasing necessities of the Government; and added that if he left the matter to him, he would proceed to the Bankshall (the place of rendezvous for the Bengal pilots) and direct one of the officers to see the owners of the tug, and tell them that if they did not send down immediately an order to take the troops in tow, he would issue an order to the officers of the Pilot Service, strictly prohibiting them from allowing the *Underwriter* to take any ship in tow of which they had pilotage charge. To this Mr. Beadon answered, “I think you would do right; and so left it with the defendant to dispose of the matter. What the defendant said he would do, he immediately did. The Government terms were still refused by the plaintiffs, and the service was unperformed by them. Whereupon, on the 22nd September, by the directions of the defendant, the order complained of was issued, and remained in force until the 19th October, when, by the direction of the Government, it was rescinded; and it is for the loss of employment during this interval that the action has been brought, and the damages awarded.

On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the plaintiffs was exorbitant or not, nor whether the opinion expressed by the defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the cause, that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For, if the act which he did was in itself wrongful as against the plaintiffs and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action:

an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below; indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be, "the invasion of the right of the plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade or calling, without undue hindrance from others." No doubt an act which *prima facie* would appear to be innocent and rightful, may become tortious if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house; *prima facie* it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

The question then is whether, in this sense, the defendant has been guilty of a wrongful act. On the one hand, the Government has frequent occasion to have vessels towed up the river, and it desires to have this done by the owners of towing-vessels on certain terms which it believes to be just; and it keeps in its service a body of pilots, who have the charge of vessels coming up the river; and it is assumed that, practically, the discretion, for the time being, of employing the particular towing-vessel that is to bring up a ship, is vested in the pilot who has her in charge. The plaintiffs decline to deal with the Government on the terms which it desires to deal on, and in a particular case insist on what appears to the Government not only to be an unreasonable demand in itself, but likely, as a precedent, to be injurious to the public interests, if yielded to in this particular instance. If the plaintiffs have the right, as undoubtedly they have, of prescribing what terms they please for the services they are to render, it cannot be doubted that the Government has an equal right to accept or refuse to deal with the plaintiffs on those terms: to say, we will employ you only if you will accept such or such a remuneration. And if the prohibition complained of had been limited to pilots in charge of vessels in the Public Service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequence might have been to the plaintiffs' business; nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government, although the consequence would have been directly a total loss of employment by the plaintiffs; for their right to exercise their calling must be understood only as co-extensive with, and not as over-riding, the right of the public or of individuals to deal with them or not, at its pleasure; the right to buy or to refuse to buy is as much to be regarded, as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this; it forbids the officers of the Pilot Service from allowing the *Underwriter* to take *any* ship in tow, of which they have pilotage charge, and the question is whether this difference in extent makes it, as against the plaintiffs, wrongful. Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has recognized a body of pilots; it does not appear that any law forbids the employment of a pilot who is not of that body, and indeed, it was proved that there were other pilots exercising their calling in the port of Calcutta, on whom the Government prohibition would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or co-operate with in performing the services for the due

performance of which they are enrolled and taken into its service. Supposing it had been believed that the *Underwriter* was an ill-found vessel, or in any way unfit for the service, might not the pilots have been fully forbidden to employ her until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And it is not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels, of all but those employed on its own account, the Government by its pilots co-operates with the plaintiffs in the service of bringing their vessels safely into port; may it not refuse that co-operation so long as it believes the demand made by them unreasonable and likely to be prejudicial to its own interests, that is, the interests of the public? Their Lordships think this question can admit of only one answer, and if so, the prohibition issued by the defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the plaintiffs.

It will be observed that their Lordships are only dealing with a case in which no malice in the most general sense of the term, is imputed or proved against the defendant. It is unnecessary to consider what would have been their judgment in a case in which the defendant had given the same advice to the Government, and done the same act towards the plaintiffs from any indirect motive, or with direct malice against them. It is enough to say that the decision of such a case would turn on totally different principles from the present.

It will be observed also that their Lordships' reasoning identifies the act of the defendant with the approbation of the Secretary to the Government: and they do this, not forgetting his letter to the defendant, dated the 15th October, in which the defendant is censured for his act, and directed to re-call it; for their Lordships think that the evidence of the defendant, uncontradicted by the evidence of Mr. Beadon, clearly establishes that the defendant acted with his approbation. To him application had first been made for directions by the Captain of the *Belleisle*, and he sought advice of the defendant, accepted the advice which was given in good faith, and could not have been withheld without breach of duty, and, if so, the character of the act cannot be changed by the change of opinion subsequently manifested, or by the censure which it was thought right to inflict upon the agent.

This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. This appeal has also been very ably argued at the Bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited, either in the judgment or the argument. It seems to them that, when the legal principle to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point: it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests, is not enough. The cases are of daily occurrence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly, without being actionable. The present case appears to their Lordships to be no more; and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the respondents.

The 30th July 1860.

Present :

Lord Justice Knight Bruce Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge,
Sir L. Peel, and Sir J. W. Colvile.

Crown—Escheat—Brahmins.

On Appeal from the Sudder Dewanny Adawlut at Madras.

The Collector of Masulipatam,

versus

Cavalv Vencata Narainapah.

On the death of a Brahmin (whether sacerdotal or not) without heirs, the Sovereign power in British India is entitled to take his estate by escheat subject however to the trusts and charges previously affecting the estate.

OF the various questions that have arisen in this case, the only one which appears to have been argued in the Court of Sudder Dewanny Adawlut at Madras—certainly the only one decided by that Court—is, whether, on the death of a Brahmin without heirs, the Sovereign power in British India is entitled to take his estate by escheat. The decision of the Sudder Court upon this question strikes at the root of the appellant's title ; and its correctness is therefore the first thing to be now considered.

The learned Judges of the Sudder Dewanny Adawlut have treated the question as one to be determined merely by Hindoo Law ; and, recognizing the general right of the Crown or other ruling power by escheat when there is a failure of heirs, having adopted and enforced an exception as to the property of Brahmins, which is supposed to result from certain texts in Menu and other ancient authorities. The arguments addressed to us have also assumed the applicability of the Hindoo Law ; and their Lordships, therefore, purpose to deal primarily with the question, whether that law, as it now obtains in British India, has, if applicable to the case, been properly held to be fatal to the appellant's title.

For the exposition of the Hindoo Law on the point, it is unnecessary to go back further than the 'Mitacshara.' That treatise, the highest authority on the law of inheritance in the part of India where the zemindary, the subject of this suit is situate, comprises, amongst other authorities, the passage of Menu, which is principally relied upon. It is, however, from the consideration of the whole chapter of the work, and of the different authorities which are there collected, taken together, that we are most likely to arrive at a right conception of the law.

The important passages are in Articles 3, 4, and 5, of Chapter 11, Section 7.

From these it would appear that the beneficial enjoyment of a Brahmin's property ought not, on his death without heirs, to pass to the King ; that it ought, in some way or another, to pass to other Brahmins. But the texts also show that it is not to pass to Brahmins generally, or even to any definite or well-ascertained class of them. The persons to take the beneficial interest are to be Brahmins, having certain spiritual qualifications ; they are to be pure in body and mind, and are to have read the three Vedas. If this be the law, it seems to imply a power of selection ; and a right of possession, at least intermediate, of the property in somebody. It cannot be supposed that the first Brahmin, who could lay hands upon the property of a member of his caste dying without heirs, was to hold it, subject, perhaps, to the condition of showing that he possessed the personal qualifications which law requires.

It appears to their Lordships that the passage quoted by the Mitacshara from Nareda, in the very Section which cites the prohibition of Menu, shows what the law in its utmost strictness was. That passage is—"If there be no heir of a Brahmana's wealth, on his demise it must be given to a Brahmana, otherwise the King is tainted with sin." In other words, the King is to take the property, but to

take it subject to the duty, which he cannot neglect without sin, of disposing of it at his discretion amongst Brahmins of the kind contemplated by the preceding texts.

If this be so, it appears to their Lordships that, according to Hindoo Law, the title of the King by escheat to the property of a Brahmin, dying without heirs, ought, as in any other case, to prevail against any claimant who cannot show a better title : and that the only question that arises upon the authorities is, whether Brahminical property so taken is in the hands of the King, subject to a trust in favor of Brahmins. In this suit, where the issue is between the Government claiming the property (whether subject to a trust or not) by escheat, and a party claiming by an adverse title, it is unnecessary to decide whether the duty imposed upon the King is one of imperfect obligation, or a positive trust affecting the property in his hands, or whether, if a trust, it is or is not one incapable of enforcement by reason of the uncertainty of its objects. It is also unnecessary to decide on the arguments addressed to us concerning a distinction or supposed distinction between the Brahmins, who have been called "sacerdotal Brahmins," and the ordinary members of the caste. For assuming that the appellant's title is to be governed by Hindoo Law, and assuming that there is no valid distinction in this matter between sacerdotal and other Brahmins, their Lordships, for the reasons above stated, would be unable to concur in the judgment under review.

Their Lordships, however, are not satisfied that the Sudder Court was not in error when it treated the appellant's claim as wholly and merely determinable by Hindoo Law. They conceive that the title which he sets up may rest on grounds of general or universal law.

The last owner of the property in question in this suit derived her title under an express grant from the Government to her husband, a Brahmin, whom she succeeded as heiress-at-law. If upon her death, there had been any heirs of her husband, those heirs must have been ascertained by the principles of the Hindoo Law ; but by reason of the prevalence of a state of law in the Mofussil, which renders the ascertainment of the heirs to take on the death of an owner of property, a question substantially dependent on the *status* of that owner. Thus the property being originally, and remaining, alienable, might have passed by acts *inter vivos* in succession to British subject, to foreign European owner, to Armenian, to Jew, to Hindoo, to Mahometan, to Parsee, or to any other person, whatever his race, religion, or country. According to the law administered by the Provincial Courts of British India, on the death of any owner, being absolute owner, any question touching the inheritance from him of his property is determinable in a manner personal to the last owner. This system is made the rule for Hindoos and Mahomedans by positive regulation ; in other cases it rests upon the course of judicial decisions. But when it is made out clearly that by the law applicable to the last owner, *there is a total failure of heirs*, then the claim to the land ceases (we apprehend) to be subject to any such personal law ; and as all property not dedicated to certain religious trusts must have some legal owner, and there can be, legally speaking, no unowned property, the law of escheat intervenes and prevails, and is adopted generally in all the Courts of the country alike. Private ownership not existing, the State must be owner as ultimate lord. Consequently, the claim of the Government, in the present instance, might have been considered with reference to this principle.

In the case of the East India Company *vs.* the Mayor of Lyons (1 Moore, East India Appeals) the question arose whether an alien could hold lands in British India. Some of those lands were without the bounds of a Presidency town. It was decided on appeal here, that that part of the law of England, which disabled an alien from holding land against the claim of the Crown had not been introduced into India ; but the reasons and principles of the decision do not appear to their Lordships to be inconsistent with the view that they take of the present controversy.

In the present case, if the Hindoo Law had expressly provided that, upon the death of a Brahmin without heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if, for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a Sudra, there would be ground for excluding the title of the Crown, because there would, by Hindoo Law, be some person in the nature of an heir capable of succeeding; but here the Court of Sudder Dewanny Adawlut rests its decision on what it terms "the primary declaration of Menu that the property of a Brahmin shall never be taken by the King." That declaration is contained in an article (*see* Menu I, and 189) which, assuming a complete failure of heirs, negatives the King's right to Brahminical property, whilst it affirms his title to the wealth of all other classes in such circumstances. In so dealing with the question, the Sudder Court was, we think, applying the actual or supposed Hindoo Law, in derogation of the general right of the British Sovereignty.

Their Lordships' opinion is in favor of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs; and they think that the claim of the appellant to the zemindary in question (subject or not subject to a trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow Lutchmedavummah in her life-time. In the latter case, the Government will, of course, be entitled to the property subject to the charge.

It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised on this appeal touching the effect of the acts of Lutchmedavummah in her life-time. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collector's acts in 1841, it is particularly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect, of the proceedings by which the execution of the razeenamah was suspended. In these circumstances, their Lordships, though they would have been glad to determine, if they could, this long litigation by a final decree, do not feel that they can safely do more than remit the appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established. It is right, however, to state further their Lordships' opinion that the proceedings of the Sudder Adawlut, under the dates of the 27th of October 1853, and the 21st of October 1854, at pp. 32 and 34 of the Appendix, do not constitute any bar to the title of the appellant in this suit; but that they do amount to an award of possession, with which, in the present state of the cause, and until its final adjudication, their Lordships will not interfere.

Their Lordships desire again to suggest for the consideration of the parties, that some arrangement for the surrender of the Zemindary to Government, upon payment of what is due to the respondent for the advances actually made, would probably meet the real justice of the case, and save both parties from protracted litigation.

by the appellant as the map produced by Chutter Singh, the defendant in 1816, there appear to be several pokhurs or tanks and an oval mark which, though it contains no description, but the words "peepul tree," the appellant now contends, denoted the old pokhur referred to in the decree. Hence the common appeal to the decree of 1816 does nothing more than settle one of the termini of the boundary line, and resolve the general issue of the boundary into the two particular issues, where was the old bandh? and where the old pokhur?

The Principal Sudder Ameen, before whom this suit was pending, took the evidence which each side tendered touching either the possession of the disputed lands or the boundary question. He also, by a proceeding dated the 5th of May 1847, (Appendix p. 10), directed one Lallah Sheeb Lall, the Record-Keeper of his Court, to visit the spot and make a plan of the disputed land in the presence of both parties. To the character and mode of proceeding of the Lallah, objection is no longer taken. He visited the spot and made the map or plan marked No. 1, and the report, which is set forth at page 11 of the Appendix. Upon these materials and the evidence taken previously, the Principal Sudder Ameen made his first decree in favor of the Appellant. It is dated the 28th of December 1848, and is set forth at page 12 of the Appendix. From that decree the respondents appealed to the Sudder Dewanny Adawlut. In the Appellate Court a preliminary objection was taken to the decree on the ground that the Principal Sudder Ameen had omitted to draw up the issues in the suit in conformity with Section 10 of Regulation XXVI of 1814; and the Court saw fit to remand the case to the Judge below, with a direction to lay down the issues in the regular way, and "having called upon both parties for proofs and refutations of those issues, to try and determine the case *de novo*." The case went back; and the Judge laid down the issues, which were substantially,—Whether the lands in question were within the boundaries of Mouzah Rampoor as defined by the decree of 1816, and whether the plaintiff's suits were within the period of limitation or not. By the same proceeding, which was dated the 4th December 1852, (Appendix p. 63), he ordered that the parties should be called upon for their proofs. The appellant took no advantage of the opportunity thus afforded to him of giving fresh evidence; but, by petition, prayed for judgment on the evidence, oral and documentary, already given. This petition is at p. 64 of the Appendix. The respondents only filed certain judgments of the Sudder Dewanny Adawlut, given in other cases, for the purpose of showing the invalidity of Sheeb Lall's investigation and report,—a point now given up. The Principal Sudder Ameen therefore made upon the old evidence a second decree in favor of the plaintiff in the suit. This bears date the 17th of December 1852, and is at page 70 of the Appendix. Against it the present respondents renewed their appeal to the Sudder Dewanny Adawlut.

The Appellate Court was divided not so much on the merits of this case as upon the proper method of determining them. Two of the Judges, without entering into the boundary question, or impugning the decision of the Court below on that point, were for reversing the decree, and dismissing the suit on the ground that the plaintiff had failed to prove his possession of the disputed lands at any time between 1816 and the commencement of the suit, or his alleged dispossession of them at any time in or after May 1834. The dissentient Judge did not go the length of saying that the decree below ought to be affirmed. He seems to have thought that the finding of the Court as to the boundary line might shift the burden of proof as to the time and manner of dispossession on the defendants; that on both issues there had been a mis-trial, and it was proper to remand the case for another trial after the preparation of a more intelligible map, and taking further and better evidence on the question of possession, particularly that of the parties under the provisions of Act XIX of 1853. The opinion of the majority of course prevailed, the decree of the Court below was reversed, and the appellant's suit dismissed. Against that decree of the Sudder Court, the present appeal has been preferred.

The learned Counsel for the appellant have not strongly contended that the proper order to be made on this appeal, is one remanding the case for re-trial in the manner suggested by Mr. Torrens, in the Sudder Court. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favour by the Principal Sudder Ameen affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sudder Court was right in treating the cause as ripe for final decision. The appellant had had, at all events, from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at his instance or with his consent. And the suspicion, however, probable of the Judge that a party who has failed to prove his case may be more successful on a second and fuller investigation, is no sufficient ground for directing a new trial.

Again, their Lordships concur with the majority of the Sudder Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of defendants who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on a dispossession within twelve years next before the commencement of the suit; and therefore that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favor, can relieve him from this burthen, or shift it upon his adversaries by compelling them to prove the time and manner of dispossession. The lands in question may have been part of Mouzah Gopaulpore, and as such may have been enjoyed by his ancestor, and yet he may have lost, by lapse of time, his right to recover them. Their Lordships therefore propose to consider, in the first place, what evidence there is that the appellant, or any person through whom he claims, was in possession of the lands in question at any time within twelve years next before the commencement of the suit.

There are eight witnesses on the part of the appellant. They all agree in stating that his grandfather Chuttur Singh was in possession of the lands in question until some time in the Fuslee year 1242, corresponding with A. D. 1835, and was dispossessed under colour of the Magistrate's award of May 1834. All of them, with the exception of the second, Baboo Ram Mundur, speak of this dispossession as "forcible;" as effected with more or less of violence, and in the face of opposition on the part of the occupiers of the land. They do not agree as to the fact whether or no a peon from the Magistrate's Court was present to give effect to the order of May 1834. They are pretty well agreed that the disputed land was, before the alleged dispossession, for the most part, under cultivation; that the cultivated portion of it was rented at from 2 rupees to 2 rupees 6 annas per beegah, and yielded from 1,100 to 1,300 rupees per annum. Some of them give the names of the cultivators: some, but not all, speak as if the whole land had been farmed by one Tajaen, who, in such case, would have paid a gross rent to the zemindar, and have made the collections from the ryots on his own account. No such person was produced as a witness; nor is the oral testimony supported by the production of any paper purporting to be lease, pottah, kubooleut, or receipt for rent,—the usual *adminicula* of proof in such cases. Again, most of the witnesses concur in saying, that, before the alleged dispossession, there was but one hamlet on the disputed lands, the inhabitants of which deserted it upon the dispossession; and that the defendants had, year by year, since 1835, established three or four new hamlets upon them.

The appellant's witnesses are contradicted by some nine or ten on the part of the respondents. The general scope of this latter testimony is to show that the disputed lands are within the boundary of Rampoor as defined by the decree of 1816, and have ever since that date been in the possession of the respondents' family; that they are identical with the 400 and 251 beegahs which were the subjects of the two suits of 1816; that the 251 beegahs, or part of them, were also the subject of the dispute with the widows of Tej Narain Singh which was settled by the award of May 1834; and that there are three hamlets on the lands in question in the suit, of which the latest in date had, in 1847, been established for upwards of twenty years. This testimony is also unsupported by documents: but the last of the witnesses seems to be somewhat more respectable in point of station than the appellant's witnesses. Let it be granted, however, that the oral evidence on the part of the respondents is no better than that on the part of the appellant. It must still lie on the appellant to make out his case; and their Lordships have next to consider whether he has done so by the greater probability of the tale told by his witnesses.

Their Lordships are of opinion that the balance of probabilities is decidedly against him. His witnesses agree that the land was for the most part under cultivation, and yielded a considerable revenue. They treat the dispossession as a single and forcible act. These admissions exclude the hypothesis, which was sometimes suggested in the course of the argument, that the respondents' possession may have been gradually acquired by *squatting* on waste land. Again, the theory is that possession was gained under colour of the award of May 1834. The 200 beegahs which were the subject of that award are either included in the 700 beegahs now in dispute, or are distinct from them. On the latter assumption, it is not easy to see (and this difficulty is wholly unexplained) how an order maintaining one man in the possession of certain lands can be made an instrument for turning another man out of the possession of other lands. The former assumption implies that 700 beegahs were taken under an award for only 200 beegahs; that the proceeding before the Magistrate, who had only jurisdiction to determine the fact of possession, was had between two parties, neither of whom was really in possession; and that he, in whose favor the award was made, successfully used it to eject the actual possessor of the lands, who, being no party to the proceeding, was not bound by it. Such doings may not be without example in India; but those aggrieved by them do not ordinarily acquiesce in them. Lastly, in any view of the evidence there was a palpable, if not violent, invasion of Chuttur Singh's possession, known to him at the time. Is it conceivable that one so prone to litigation as he is shown to have been, would not immediately have sought redress either by a summary proceeding under Regulation XV of 1824, or by regular suit? To account for his unnatural acquiescence, the appellant and his witness have recourse to a very common subterfuge of falsehood. They say that the respondents admitted their adversary's title, and promised to restore the land. The plaintiff alleges that there were repeated assurances of this kind. The witnesses only depose to one *ante litem motam*; but add that ten years afterwards, when the suit had been commenced by Chuttur Singh's son, the respondents again offered to relinquish the lands on being released from the claim for mesne profits. Their Lordships consider this part of the appellant's case simply incredible. And on the whole evidence they are of opinion that he has failed to give that proof of the alleged possession of Chuttur Singh which is essential to the maintenance of this suit.

This being so, it is unnecessary to go into the boundary question. Upon that, although sensible of the force of Mr. Palmer's observation, that questions of that kind are presumably best determined by local Judges, their Lordships are by no means satisfied that the Principal Sudder Ameen has come to a correct conclusion, or that the lands in question are within the limits of Mouzah Gopaulpore

as defined by the decree of 1816. But they do not decide this question. Their decision of the other is of itself sufficient ground for the recommendation, which they propose to make to Her Majesty, that this appeal be dismissed with costs.

The 3rd December 1860.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner,
Sir L. Peel, and Sir J. W. Colville.

Jurisdiction—Cause of Action—Contract of Partnership.

On Appeal from the Sudder Dewanny Adawlut at Agra.

Sets Luchmeechund Radhakishen and Gobind Doss,

versus

Sets Zorawur Mull and others.

A contract was entered into at Rutlam for the establishment of a partnership to be carried on principally at Muttra, where all the transactions were to be conducted by means of the capital embarked in the concern at that place. **Held**, that the cause of action in a suit, for the balance resulting from these partnership transactions arose at Muttra.

THE proceedings of the plaintiffs in this cause have not been particularly expeditious, as we are now dealing with a decree of the Sudder Court made in the month of June 1852, affirming a decree of the Zillah Court, by which the plaintiffs' suit was dismissed on the ground of want of jurisdiction.

The only question which their Lordships have to determine is, whether the contract which was entered into between the parties, or the cause of action arising out of that contract, occurred within the jurisdiction of the Zillah Court of Agra.

If this question had depended upon the authority of Salig Ram to enter into any contract by which he could bind the respondents, probably their Lordships would have determined that there was no evidence whatever to show that he possessed any such authority, because in the petition which he presented to the Resident of Indore, and which was put in by the appellants themselves, and made part of their evidence, Salig Ram distinctly states that no partnership existed between him and the respondents; and if he were merely the gomastah of the respondents, he could have no power, in that character alone, to bind them to any such partnership, as it is alleged he entered into. But whether this is so or not, it is quite clear that the letter which has been put in evidence by the appellants, and which was written by one of the respondents, amounts either to a contract of partnership or to a ratification of what had been previously done by Salig Ram. Now, although that contract was entered into at Rutlam, yet it was for the establishment of a partnership which was to be carried on principally at Muttra, where all the transactions were to be conducted by means of the capital embarked in the concern at that place.

The partnership having been thus established, advances were made from time to time according to the terms of that partnership. Money was transmitted to Indore and other places. So far as those advances were from time to time made, though they did not constitute any debt upon which there would be any cause of action arising to the appellants, yet they were made in pursuance of the partnership contract; and if the speculation had been a successful one, the profits would, of course, have gone to countervail the advances. But it turns out that the undertaking was unprofitable, and that losses were incurred, and the claim which is now made being the cause of action alleged by the appellants is for a balance of ten lakhs of rupees arising out of these partnership transactions.

Now where can it be said that the cause of action, supposing it exists for that balance, properly arose? Muttra was undoubtedly the central place of business;

at Muttra the partnership books were kept ; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them ; and if, in the result, a balance was due to the appellants, Muttra would be the place where the payment of that balance would have to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra.

Under these circumstances, it is quite unnecessary for their Lordships to make any further observations upon the case ; indeed, they are anxious not to touch, in the slightest degree, upon the merits of the question between those parties. They must assume, of course, but merely for the purpose of the determination of this question, that there is a balance due to the appellants arising out of the partnership that was established.

Their Lordships are, therefore, of opinion that both these decrees must be set aside, but as there are two decrees in favor of the respondents, their Lordships are of opinion that this should be without costs.

The 6th December 1860.

Present :

Lord Chelmsford, Lord Kinsdown, Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colvile.

Mortgage by Insolvent—Lien of mortgage prior to claim of Official Assignee.

On Appeal from the Supreme Court at Madras.

Moses Kerakoosse,

versus

Benjamin Brooks, as Official Assignee of the Insolvent Estate of Agapah Cundasawung Moodelly.

A mortgage executed by an Insolvent (who has not obtained a certificate and discharge) is subject to the lien of the mortgagee in priority to the claim of the Official Assignee under the insolvency.

UNDER the Statute* the assignee has a right to the subsequently acquired property of the insolvent, unless the insolvent has obtained a certificate and discharge ; but the assignee's right to the subsequently acquired property is subject to two qualifications. In the *first* place, if the insolvent has acquired property, subject to debts and obligations, then any property taken by the assignee under that state of things is taken subject to those charges and equities which affect the property in the hands of the insolvent. The *second* qualification is this, that if the insolvent carries on trade at a subsequent period, with the assent of the assignee of the estate under the Insolvent Act, in the first instance the property which is acquired in the subsequent trade, will be subject in equity to the charge of the creditors in that trade, in priority to the claim of the assignee under the first insolvency.

Now, in this case, when the facts are stated, their Lordships cannot entertain the slightest doubt. It is admitted that, what has been done might have been done in such a way as to exempt the property from the claim of the assignees. Then what is the transaction which takes place ? The insolvent carries on for a certain time the business of a hotel as agent for manager for other persons. On the 7th of February he makes an arrangement with the appellant, by which he becomes the purchaser of the property now in dispute, and carries on the trade subsequently on his own account, with the knowledge of the assignee under the insolvency. Under what circumstances, then, does he acquire property by which the subsequent trade is carried on ? Does he acquire an absolute right to it, discharged from any lien, or does he acquire a right to it subject to a legal or equitable title on the part of other persons ?

Now, it appears that a sum of money was advanced by this appellant for the purpose of being laid out in the purchase of the property ; and at the time it is advanced, it is advanced subject to an agreement, that it is to be laid out in that particular manner ; and that the property is to be assigned to the person who advances the money in order to secure the advance. A mortgage is executed accordingly. It is one single transaction by which the insolvent never acquired anything except subject to the lien of the creditor, and the assignee can stand in no better situation.

Their Lordships, therefore, must advise Her Majesty that the judgment of the Court below ought to be reversed

Mr. Roundell Palmer.—The judgment will be reversed with costs, I hope.

Lord Kingsdown.—This is a special case which was agreed upon. What was done in the argument upon the special case in the Court below ?

Lord Chelmsford.—The costs always abide the event.

Lord Kingsdown.—Then it must be with costs.

Mr. Lewis.—Will your Lordships give the costs of the appeal against the respondent ?

Lord Kingsdown.—The rule here is that the costs follow the event, unless the Court make order to the contrary. The appellant must have his costs both here and in the Court below.

Mr. Roundell Palmer.—Your Lordships will declare that the appellant is entitled to the proceeds.

Lord Kingsdown.—Yes, that the appellant is entitled to the amount claimed.

Mr. Reeve.—Their Lordships will declare that the appellant is entitled to the net proceeds of the sale.

Mr. Roundell Palmer.—I do not know whether, when a deposit has been made under your Lordships' order for leave to appeal, anything need be said about its return, or whether that follows as a matter of course.

Lord Kingsdown.—Yes ; I understand so.

Mr. Reeve.—That follows as a matter of course ; the money is paid into the Registry when deposited, and is paid out to the same party, if he is entitled to it, immediately after the appeal is disposed of.

The 20th December 1860.

Present :

Lord Chelmsford, Lord Kingsdown, Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colvile.

Limitation (Regulation III, 1793, s. 14)—Erroneous proceedings in enforcing ineffectual orders of a single Judge of the Sudder Court.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Doorgapersaud Roy Chowdry,

versus.

Tarapersaud Roy Chowdry.

A party who had been endeavouring, by resort to competent Courts, to recover his rights, was held to be entitled to avail himself of the exception in the former Law of Limitation (Regulation III. 1793 s. 14) although part of the proceedings was erroneous in enforcing an order made by a single Judge of the Sudder Court, which was ineffectual by reason of its not being confirmed by a second Judge.

A SUIT was instituted by the present respondent in 1853, and the only question in the case is whether the respondent is barred from the prosecution of his claims in this suit by the Indian Law of Limitation.

This is an appeal against a decree of the Sudder Adawlut, dated June 17, 1857 ; but it is necessary, to the correct understanding of this case, to state some of the circumstances under which the suit was commenced and the decree pronounced.

It appears that both the appellant and respondent are brothers ; their uncle died without issue in 1810 ; their father died in 1821, having succeeded to the property of their uncle, and he left the appellant and respondent, his two sons, joint heirs-at-law. The property, which so devolved upon them, was very considerable, and much litigation ensued as to the division and possession of that property which was situated in various districts : to recover each portion of the property lying in various districts, it would be necessary to institute proceedings in the various Courts having local jurisdiction.

On the 29th of January 1827, the present appellant instituted a suit against the respondent, in the Provincial Court of Calcutta, to recover a certain share in Zillah Jessore, which was, in fact, a very small part of the estate in question. Whilst this suit was pending, the parties to it came to an agreement to compromise their claims, and, on the 4th of April 1829, deeds of compromise were executed and filed in the Zillah Court—they agreed to divide the estate in certain proportions ; and it was further stipulated that, in the event of either of the parties not agreeing to act according to the terms of the compromise, they had no objection to the Court's insisting upon, and enforcing, the observance of the said compromise.

The respondent applied to the Collector for an Ameen, to make a partition in terms of the above deeds.

On April 24, 1829, the appellant, who was the plaintiff in that suit, presented a petition to the Provincial Court, praying that the suit might be struck off the file of the Court, on the ground of the compromise being effected. The respondent, on April 25, 1829, objected to this petition, and alleged that the compromise was not binding, undue influence having been exercised by the Collector to bring about the same.

The Provincial Court of Calcutta, however, in September 22, 1829, made the following order : that the case be struck off the file, and that the parties conform to their respective engagements ; in the event of their not conforming to the same, this Court shall insist on and cause them to conform to the conditions of the compromise. The suit was removed from the file on September 2, 1829, and the value of the stamp returned to the present appellant.

The present respondent appealed to the Sudder Adawlut. On June 21, 1832, Mr. Walpole decreed that the appeal should be dismissed, and that the decree of September 1829 should be confirmed. He further stated that the parties were entitled to take possession according to their respective rights under the compromise. On July 5, 1832, Mr. Ross, another Judge of the same Court, declared his concurrence with Mr. Walpole.

Now, as these decrees were never appealed from, they are, to all intents and purposes, binding decrees. But, before proceeding farther, it may be expedient briefly to consider the effect of the proceedings just recited. It is quite clear that the suit, commenced on January 29, 1827, was entirely at an end ; and having been struck off the file, and the value of the stamp returned, no further proceedings could be had in that suit. But the Provincial Court were of opinion that, by the consent of both parties, they were entitled to take cognizance of the deed of compromise executed on April 4, 1829, and to enforce the observance of the same, notwithstanding that the deed of compromise embraced property out of the Zillah Jessore, and in Zillah 24-Pergunnahs, and other places, which properties were not sued for in the original suit. Whether this proceeding was strictly regular or not, cannot now be made a question. Of that opinion are all the Judges of the Sudder Adawlut which had cognizance of the present suit, including Mr. Raikes who thought that there was an error in the first instance in the Court so taking cognizance.

We will now return to the consideration of what was done by the present respondent upon the decrees of the Sudder Adawlut of June 21, 1832, and July 5 of the same year. He lost no time in resorting to the Court for the purpose of

recovering the mesne profits, for, in September of the same year (1832), he presented a petition, in what is called the Miscellaneous Department of the Sudder Adawlut, praying for mesne profits, agreeably to the Circular Order of September 11, 1829, which is in the following terms:—

“The Court are of opinion that, in all cases where money liable to bear interest is payable under the decree of a Court, a clause should be inserted in the decree providing for the allowance of interest until the decree is carried into final execution, and that, in the event of such provision being omitted in a decree, the Court, by which the same may have been passed, is competent to order at any future period the payment of the interest on the amount decreed, which may have accumulated subsequently to the date of the decree, without referring the party to a new suit for the recovery of such interest; and that the same principle is applicable to profits in cases of decrees for landed property.”

The Sheristadar of the Court reported on the back of the petition that no wasilat had been decreed to the respondent by the said decree of the Sudder Adawlut, notwithstanding that it had been applied for. In consequence of the objection so raised by the Sheristadar on September 10, 1832, the matter was again brought by petition before Mr. Ross, one of the Judges of the Sudder Adawlut, and Mr. Ross, then sitting alone, made an order that the respondent was entitled to mesne profits from July 5, 1832, to the date of his obtaining possession; and on September 18, 1832, Mr. Ross made another order, again sitting alone, whereby he ordered that a copy of the appellant's petition, with the decision of this Court, be sent to the Judges of the Court of Appeal at Calcutta, with an order that, if the appellant should not have already obtained possession of his proper share under the deed of compromise, possession should then be awarded to him in execution of the decision of this Court; and further, that after awarding wasilat to the respondent from the date of the decision of this Court to the date of the recovery of possession, a report that this order has been carried out, accompanied with the decision forwarded herewith, be transmitted to this Court.

We do not find that the Judges of the Court of Appeal at Calcutta took any further notice of these proceedings, and we might, perhaps, be at some loss to discover why, if there was any error in them, some observation respecting that error, some suggestion as to setting it right, should not have been made; however nothing of this sort was done; various proceedings were had for the purpose of recovering this wasilat before several Judges in the Zillah Court of the 24-Pergunnahs, and these proceedings were in the Miscellaneous Department.

This Court is not very accurately informed what is included under the term “Miscellaneous Department,” but for the purposes of the present appeal that department may be taken to include the carrying into effect decisions made by the Court of Sudder Adawlut, as contra-distinguished from the commencement of an original suit. In one of these proceedings, an order made by one of the Judges was carried up to the Sudder Adawlut when that Court, on July 21, 1853, decreed that the order by Mr. Ross, passed on the 10th of September 1832, in favor of Tarapersaud, for wasilat, was, without the concurrence of Mr. Walpole, incomplete and not binding by law, and its execution not obligatory on the Court.

Now, this decree not having been appealed from, must be considered as containing a correct statement of the law; but we may observe that the Court did not pronounce the decree of Mr. Ross to be null and void, and that the defect, such as it was, was never discovered during the whole of the preceding litigation for one-and-twenty years, though of course, if this had been a palpable defect, there were very numerous opportunities for its discovery; the consequence of this decree of the Sudder Adawlut, July 21, 1853, was that the present respondent was thrown back upon the decrees of June 21, and July 5, 1832, which decrees had ordered him to be put in possession of his proper share of the property, but had not decreed wasilat.

It might perhaps have been a question whether, under those decrees of June 21 and July 5, coupled with the Circular Order of September 11, 1829, the respondent

had not obtained a decree, giving him a right to wasilat accruing ; but, however that might be, in the same year, 1853, the respondent instituted the present suit, praying that his demand for wasilat should be admitted : one of the defences to that suit, was that his claim was barred by the Law of Limitation for all wasilat accruing at a period beyond twelve years from the institution of that suit. The Principal Sudder Ameen, amongst other matters which were decided by his decree, pronounced that the Law of Limitation did apply ; the other matters were decided in favor of the present respondent. Both parties appealed from this decree to the Sudder Adawlut, and on June 17, 1857, that Court pronounced its decree, whereby it decided, by a majority of two out of the three Judges, that the Law of Limitation did not apply, and remanded the case to the Zillah Court for further consideration.

The question now for their Lordships to advise Her Majesty is, whether the majority of the Sudder Adawlut were right in their view of this case, and it may be first expedient to state, so far as is necessary, the Indian Law of Limitation. It is to the following effect :—

“The Zillah and City Courts are prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen previous to the 12th of August 1765, or any suit whatever against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show, by clear and positive proof, that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim, within that period, for the matters in dispute to a Court of competent jurisdiction to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that, either from minority or other good and sufficient cause, he had been precluded from obtaining redress.” (Regulation III of 1793, sect. 14).

Now, it appears to their Lordships to be clear that this cause of action cannot be said to arise upon the suit which was struck off the file in 1832, neither do we think that it can be properly said that the cause of action arose upon the agreement of compromise alone, for it is obvious that all the proceedings have been founded upon the decrees of the 21st of June, and the 5th of July, 1832, decreeing possession to the respondent. In fact, all the subsequent proceedings are subsidiary proceedings in the same suit, and all for the purpose of carrying into full effect those decrees which, though they did not in terms do more than decree possession, yet, taken into consideration the order of September 1829, and the justice of the claim, gave the respondent a right to wasilat up to the time when the appellant did justice and obeyed those decrees by allowing the respondent to have possession of the property justly belonging to him. All these proceedings are connected together from the time that the rights of the parties were finally settled by the decree of July 5 : the respondent was never remiss in the prosecution of his claim ; he resorted to the proper tribunals for that purpose, and year after year legal investigations were going on for the purpose of ascertaining the amount to which he was justly entitled. None of the many Judges engaged in these investigations detected any error or irregularity in these proceedings till 1853, when the Court of Sudder Adawlut for the first time discovered that the order made by Mr. Ross was ineffectual by reason of its not being confirmed by a second Judge.

Admitting that such order was ineffectual, and that proceedings to enforce it could not avail, we think that such erroneous proceedings did not operate as a total abandonment of the rights under the decrees of June and July 1832. We think that it may be fairly said that the respondent was continually endeavouring by resort to competent Courts, to recover his rights, and that he is not ousted from availing himself of the exception in the Law of Limitation by reason that part of the proceedings was erroneous.

We concur with the majority of the Court, and deem it most expedient to found our concurrence upon the reasons we have stated, and do not take into consideration other matters which might admit of more doubt.

We shall humbly advise Her Majesty to affirm the decree of the 17th of June, with costs, feeling assured that it is consistent with a just construction of the Law of Limitation and with the Justice and equity of the case.

The 6th February 1861.

Present :

Lord Chelmsford, Lord Kingsdown, Judge of the Admiralty Court, Sir E. Ryan,
and Sir L. Peel.

Compromise (between Husband and Wife)—Armenian Christians.

On Appeal from the Supreme Court at Calcutta.

Catherine Arathoon, on her demise, Gasper Gregory, Executor,

versus

John Cochrane.

An agreement in the nature of a deed of compromise was executed in the English form between a husband and wife (Armenian Christians), relative to the wife's separate property. The present suit was brought by the Official Assignee under the Insolvent Act of the husband, not for the specific performance of an agreement remaining *in fieri* in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law, but to set aside an act done in plain violation by the wife of an agreement which, in all its material parts, had been executed, and all the benefits of which the party violating it retained on her part, while, as against the other party, she treated it as a nullity.

Held that the fraudulent exclusion out of the settlement of a house alleged to have been purchased by the husband with the wife's money, which was the foundation of the defence, had not been established against the husband; that, even if it had been, it could not have been used as a defence in this suit; that, if the house was bound by a trust for the children, it could not be subject to a right of execution for the wife's private debts; and that her proper course would not have been to treat the agreement as a nullity, but to act upon it, and enforce it by a bill to compel a settlement of the property which had been improperly withheld.

In this case the original appeal was brought by Catherine Arathoon, since deceased, against a decree of the Supreme Court of Calcutta, on the Equity side, which in effect set aside an execution issued by the appellant, and directed a reconveyance of the property seized and sold under it. Mrs. Arathoon having died, the suit has been revived by the present appellant who is her personal representative.

The respondent is the assignee, under the Insolvent Act, of A. H. Arathoon (the husband of the late appellant), against whose property the execution in question was issued.

The husband and wife were both Armenian Christians. The marriage took place in the year 1836, the lady at that time being little more than twelve years of age, entitled to a large property, both real and personal, and under the wardship and protection of the Provincial Court of Dacca, where she resided.

Previously to the marriage, the future husband, at the instance of an aunt of the wife, signed an *ikrarnamah* or agreement, by which provision was made for some settlement of the real and personal estate of the wife. The instrument itself was destroyed by Arathoon, after the marriage, in a fit of passion, as he alleges, and the contents of it do not distinctly appear.

Though the marriage took place without the sanction of the Court, the husband was put into possession of the real and personal property of the wife. It is suggested in the appellant's case that he was so put into possession as the tutor and guardian of his wife during her minority, and that this was done in conformity with the Armenian Law, by which their rights were to be governed. It does not appear that on this occasion the *ikrarnamah* was brought under the notice of the Court.

There were several children of the marriage, which proved a very unhappy one; there were continual quarrels between the husband and wife; and at last they separated in 1845.

In June 1845 Mrs. Arathoon brought a suit against her husband in the Zillah Court of Backergunge, in which she stated that she had attained her majority ; charged him with ill-treatment and malversation of her property ; and prayed that he might be decreed to account for the same, and that she might be put into possession of the whole of her real and personal estate which had been, as she alleged, entrusted to him as her legal guardian.

The husband, by his answer, insisted that the rights of the parties were to be governed by English Law, and that by such law the proprietary right to his wife's real and personal estate had vested in him, and that the instrument which he had executed was not binding upon him.

On the 22nd of September 1845, the suit was heard before the Judge of the Zillah Court who held that the Armenian Law was to prevail ; that the husband by his conduct had put an end to the state of tutelage in which the plaintiff was placed ; and that her right to the control of her own property, which he stated to be undoubted according to the Law, could no longer be withheld. He then declared that the wife was entitled, both by law and by virtue of the agreement entered into before the marriage, to have delivered up to her the whole of her real and personal property, and also to have an account of the by-gone rents and profits, subject to a deduction in respect of the sums which the defendant could prove that he had expended in the maintenance of the family during the time that the wife resided with him. The decree, then, as we understand it, though the matter is not very clear, charged the defendant with the value of all the real and personal property of the wife which he was shown to have possessed, amounting to 3,99,510 rupees, of which about 1,86,000 rupees was the value of the real, and the remainder the value of the personal, estate.

Against this decree there was an appeal to the Sudder Court at Calcutta, by which the judgment below was affirmed on the 17th of August 1848.

It is obvious that this decree involved the consideration of several important questions ; whether the Armenian or the English Law was to regulate the rights of the parties ; and if the Armenian, whether by that Law the wife was entitled to the whole of her real and personal estate as if she were a *femme sole*, exempt from all claims on the part either of her husband or children (a notion not entirely consistent with the fact that the husband had been required before the marriage to execute an agreement renouncing or limiting his right) ; and, if so, whether the agreement had contained a provision limiting the wife's powers, securing the property after the death of the parents to the children. If, on the other hand, the rights of the parties were to be regulated by the English Law, it would be difficult upon any principles to maintain the decree.

It is insisted by the appellant that this decree not having been made the subject of appeal within twelve months to Her Majesty in Council, had become final before the compromise which is the subject of the proceedings now before their Lordships was made, but their Lordships think that what afterwards took place removes any bar which could have been caused by lapse of time.

The decree in question had been made in the absence of the children who were not parties to the suit. There were, at this time, four such children, all, of course, by our law, infants. Three were residing with their father, and one, the youngest, with the mother.

On the 2nd of August 1848, a few days after the affirmance of the decree, a bill was filed in the Supreme Court of Calcutta in the names of the infant children of Mr. and Mrs. Arathoon, by the brother of Arathoon, as their next friend, against the father and mother. This bill stated that, by the terms of the agreement or *ikrarnamah*, executed by the husband before the marriage, the children were entitled in reversion to the whole real and personal property of the wife ; that such agreement had been destroyed by Arathoon ; that he was totally unable to pay the large debt awarded against him in his wife's suit ; that he would be

thrown into prison, and the children, who were residing with him, would be left to starve. The bill prayed that the contents of the agreement might be ascertained, and that the rights of the children might be secured, and that the wife might be restrained by injunction from executing the decree which she had obtained, and by which the whole property in which the children were interested would be swept away.

It is suggested by the appellant that the object of the children's suit was to defeat, without any appeal, the execution of the decree obtained by the wife, and that the suit was instituted in collusion with the husband which is very possible. But, however this may be, on the institution of the second suit, further proceedings in both suits were stayed, negotiations for an amicable settlement of the disputes between the husband and wife were entered into, the parties came together again, and cohabited till the 30th of April 1849.

It is clear that the time which elapsed during this interval could have no effect in barring Arathoon's right of appeal against the decree of the 17th of August 1848.

On the 30th of April 1849, the parties again separated. Mr. Arathoon thereupon sued out a writ of execution under the decree of the 17th of August 1848, and was put into possession of her real estates, in the receipt of the rents and profits of which her husband had been up to this time.

On the 12th of May 1850, Arathoon sued out of the Supreme Court a writ of *habeas corpus* against his wife to recover possession of her youngest child, then a little more than three years old, who was living with his mother, and an order was made by the Chief Justice for the delivery of such child to the father.

On the 15th May 1849, Mrs. Arathoon filed her separate answer in the suit of the children. She denied that the *ikrarnamah* signed by the husband, contained any provision for the children, or any restriction upon her rights, or that she was at all bound by it if it did. She stated that, under the decree of August 1848, she had obtained possession of her real estate; but that all her personal estate and the mesne profits of her real estate, still remained to be recovered from her husband.

To enforce these claims she issued two writs of execution out of the Zillah Court, by one of which, dated the 21st of May 1849, the Zillah Judge directed the Nazir of the Court to apprehend Arathoon, unless he paid the sum of 1,15,620 rupees 8 annas 10 pie; and by the other of which, dated the 29th of the same month, the Judge directed the same Officer to levy the lands, goods, and chattles of her husband the sum of 1,16,236 rupees 8 annas 9 pie, besides costs of suits.

How these sums were made out does not very distinctly appear, nor do we understand upon what principle the two writs were issued, one against the person, and the other against the property of the husband, for different amounts, nor whether they were for different portions of the same debt, or whether the one was included in the other.

For the purpose of the present appeal, however, these questions are not very material. It is clear that both these writs were founded on the decree of the 17th August 1848; that the real estate awarded by that decree had been delivered up; and that the sum found due for personal estate, and rents and profits of the real estate, alone remained to be accounted for, subject to an allowance in respect of the sums expended in maintenance.

In this state of the litigation in this unfortunate family, negotiations were entered into for the settlement of all their disputes. Agents and friends were employed on both sides; and at length, after a long interval of discussion, the terms were agreed upon, and were embodied in a deed in the English form, dated the 17th July 1849, which was made between Mr. Arathoon of the first part, her husband of the second part, the next friend of the infants in their suit of the third part, and a formal party of the fourth part.

This deed contained a very full recital of the disputes subsisting between the parties, and a statement of the personal property of the wife disposed of by the husband, or remaining in his hands, by which it appeared that 70,000 rupees had been laid out in the purchase of a real estate in the Old China Bazar at Calcutta in his own name, and that Government Promissory Notes to the amount of 21,000 rupees were still in his hands; and it then provided that all the suits and litigation should be terminated upon the terms subsequently stated. These were, in effect, that, upon the children's suit being compromised by order of the Court, Mrs. Arathoon would enter up satisfaction on the judgments which she had obtained against her husband, and in the meantime suspend their execution; that promissory notes in the hands of the husband should be made over to her; that the property situate in Calcutta should be vested in Trustees, to be approved of by the Master, upon trust to pay the rents to Arathoon, he maintaining three of the children, who were to remain with him, and after his death to pay the rents to the wife if she survived, and after the death of the husband and wife, in trust for all the children, and the issue of such as should die. It was then provided that one of the children already born, and the child of which the wife was then pregnant, should reside with her, and that the husband and wife should in future live separate, and a deed of separation and mutual releases were to be executed. The next friend of the infants was to obtain a reference to the Master to enquire whether it would be for their benefit that their suit should be compromised on these terms, and the wife was to pay her own costs, and also the costs of the infant plaintiffs in their suits.

An order was accordingly obtained in the infants' suit for a reference to the Master, as provided by the agreement. The Master seems to have doubted whether he could sanction, on their behalf, the proposed compromise, and he required, before he did so, that Arathoon should put in his answer. By his answer Arathoon admitted that the *ikrarnamah* was to the effect stated in the bill, and that in a fit of passion he had destroyed it; he said that at the time of the marriage he was a person of independent, though small, property; and he admitted that he was wholly unable to pay the large amount for which execution had been issued against him, or adequately to maintain the children.

The Master ultimately approved the compromise. His report was confirmed by the Court which, on the 18th February 1850, made an order, directing the compromise, as regarded the children, to be carried into effect, and a proper deed to be executed for conveying the estate in the Old China Bazar to Trustees upon the trusts proposed by the agreement.

A deed was accordingly prepared and executed, bearing date the 25th December 1850, by which this estate was conveyed to two gentlemen of the names of Bagram and Voss. The promissory notes of the Government described in the deed of compromise were transferred to Mrs. Arathoon. She remained in possession of her real estate; she lived separate from her husband without any interference by him, and she had the custody of the child who was to be retained by her, and also of that which was born subsequently to the agreement, and the suit of the children was put an end to. In short, she received the full benefit of every stipulation contained in her favor in the deed of compromise, which, as regarded her interests, was in substance fully and completely executed.

She did not enter up, and probably was not called upon to enter up, satisfaction on the judgments which she had obtained against her husband, and on which execution had been issued; this was a mere formal act.

The amount of promissory notes which had been handed over to her, and the value of the China Bazar estate, now settled on the children, were included in the sums for which the executions had been issued, and by the transfer and conveyance under the terms of the compromise, these judgments had been actually satisfied.

Availing herself, however, of the circumstance that satisfaction had not been entered up, Mrs. Arathoon, on the 21st January 1853, while she was enjoying the benefits secured to her by the compromise, adopted the extraordinary proceeding of putting in force one of the writs of execution which had been thus satisfied, and seizing under it a house in Free School Street, Calcutta, as property belonging to her husband and liable to her execution. The husband's interest in this house was sold by the Sheriff, and the house was purchased by Mrs. Arathoon, and, in May 1854, was conveyed to a Trustee for her.

Arathoon hereupon took the benefit of the Insolvent Act. The respondent was appointed Assignee, and in the month of September 1855, he filed against the late appellant and the Trustee for her, to whom the house in Free School Street had been conveyed, the bill out of which the present appeal arises. This bill insisted on the terms of the compromise, and prayed that it might be declared binding upon the defendant, Mrs. Arathoon, and that she might be decreed to enter up satisfaction on the decree or judgment in her suit, and that the house in Free School Street might be conveyed to the plaintiff as Assignee of Arathoon.

The defendant by her answer admitted the agreement, but alleged that she had been induced to enter into it by the positive statement of her husband; that, except the China Bazar estate, he was possessed of no property whatever; while, in fact, he was at that time possessed of the house in Free School Street, which had been conveyed at the same time with the Old China Bazar estate to the same Trustees; that the fact of such right of her husband to this property had been fraudulently concealed from her at the time of the compromise, and she insisted that, under the circumstances, she was well justified in seizing the Free School Street house under her writ of execution, and refusing to enter up satisfaction on her judgment. She appended to her answer the copy of a notice which she had received from the Trustees under the deed of the 25th December 1850, already referred to, in which it was stated that, by a deed of the same date, the house in Free School Street had been conveyed to them by Arathoon upon certain trusts for the benefit of himself, his wife, and children, which do not appear to differ very materially from those to which the Old China Bazar estate was subject.

Evidence was gone into, and at the hearing the Court was of opinion that the defence was not made out in point of fact, and that, if it had been, it could not have been sustained in point of law.

The decree ordered satisfaction to be entered on the judgment, and the estate in question to be conveyed to the plaintiff, subject to any claims which might be established against it by the Trustees under the conveyance in trust alleged to have been executed by Arathoon.

Their Lordships agree with the Court below in their opinions on all the points which they had to consider.

There is no evidence that Mrs. Arathoon, in entering into the agreement of compromise, acted under the belief that her husband was possessed of no real estate beyond that in the Old China Bazar. If she really was acting upon that assumption it was necessary, in order to make the fact of any importance, that it should have been communicated to her husband; for otherwise there could be no thing to require him to make any discovery of his property, or to subject him to any imputation of bad faith for omitting to do so. But no such communication appears ever to have been made, and there is no sufficient proof that Arathoon ever made, or was ever called upon to make, any disclosure as to the amount or particulars of his property, except as to purchases made with the money of his wife. There is no statement in his answer in the suit of the children that he had no real property, except the Old China Bazar estate, and he had, and his wife could not well be ignorant that he had, a share in a house in Calcutta which had belonged to his mother.

The grounds of the compromise are fully stated in the recitals of the deed. It is not pretended that such recitals are inaccurate, and from the beginning to the

and there is no trace of the alleged statement of the husband, nor of the pretence now set up that his state of destitution was any consideration for the wife entering into the compromise. He had, indeed, stated, what was equally true, whether the Free School Street house belonged to him or not, that he was unable to satisfy the judgment obtained by his wife. This lady received ample consideration for abandoning her writs of execution. She secured a separation from her husband. She got rid of any claim by him and by her children to any part of her real or personal estate, except the property in the Old China Bazar. She prevented any appeal against the decree which had been pronounced in her favor in the Sudder Court, and she secured the custody of two of her children.

That the enquiry as to Arathoon's property was confined to purchases made with the money of his wife, is clear from what took place in the month of March 1850.

At that time Mr. Templeton, the Solicitor of Mr. Arathoon, supposed that Arathoon was the owner of the house in Free School Street; and he insisted that the house had been purchased with Mrs. Arathoon's money, and ought to be included in the settlement on the children. He wrote to this effect to Mr. Denman, the Solicitor acting for the infants; and it is clear from the evidence that both Mr. Denman and Mr. Templeton considered that the principle of the arrangement for the compromise was that all real estate, which had been purchased with Mrs. Arathoon's money, should be the subject of the settlement. This is perfectly consistent with the recital in the deed, and with the commission of a fraud by Arathoon in misrepresenting or concealing the fact that such purchase had been so made. But there is no trace of any claim being made on behalf of Mrs. Arathoon on the property at this time, supposing it to be the independent property of the husband, not purchased with her money, nor is there any complaint of misrepresentation or concealment by him, if that was the case. There was full opportunity of enquiring into the circumstances between the month of March, when the claim in question was brought forward, and the subsequent month of December, when the compromise was carried into effect; and the lady at that time acquiesced in the arrangement previously made, and accepted the benefits thereby given to her in satisfaction of her claims under the judgment.

On the whole, their Lordships are satisfied that no such fraud, as is the foundation of the defence in this case, has been established against the husband. If it had been, it could not have been used as a defence in this suit, which is not one for the specific performance of an agreement remaining *in fieri*, and in which a Court of Equity has a discretionary power to grant or to refuse relief beyond the law. It is a bill to set aside an act done in plain violation of an agreement which in all its material parts had been executed, and all the benefits of which the party violating it retained on her part, while, as against the other party, she treated it as a nullity.

There may be reason to suspect from the evidence that the house in Free School Street was purchased, with the wife's money and that, if so purchased, it ought to have been included in the settlement, and that it was kept out of the settlement by the fraudulent misrepresentations or concealment of the husband. But on that hypothesis the proceedings of the wife are equally irregular. If the house was bound by a trust for the children, it could not be subject to a writ of execution for her private debts. Her proper course would have been not to treat the agreement as a nullity, but to act upon it, and enforce it by a bill to compel a settlement of the property which had been improperly withheld.

In truth, however, it appears that a settlement had been made of the house on trusts pretty much the same with those applicable to the property in the Old China Bazar.

On the whole, their Lordships agree both with the decision in the Court below, and with the reasons assigned for it in the extremely able judgment of the

Justice, and they must advise Her Majesty to affirm the decree complained of with costs.

The 13th March 1861.

Present:

Lord Kingsdown, Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel,
and Sir J. W. Colville.

Zemindary—Bond (by mother of minor adopted son).

On Appeal from the Sudder Dewanny Adawlut of Madras.

Chetty Colum Coomara Vencatachella Raddyar,

versus

Rajah Rungasawny Jyengar Bahadoor.

A bond executed by a widow in possession of a zemindary was held binding on the adopted son of the late zemindar, the inference from the evidence being that the bond was given for debts which the defendant (the adopted son), as owner of the zemindary, might be liable to pay, and that by his own acts he had admitted that he actually was liable to the payment.

IN this case an action was brought by the respondent against the appellant, upon a bond for 17,000 rupees, dated the 27th August 1841.

The respondent obtained judgment for the amount of the bond, with interest, in the Civil Court of Trichinopoly on the 10th March 1857.

This judgment was affirmed on appeal by the Sudder Adawlut on the 5th May 1858, the Judges being unanimous.

From this decree the present appeal is brought.

The appellant is the adopted son of the late zemindar of Torriore. He was adopted by the widow of the zemindar after his death; and he is in possession of the zemindary.

It appears that the widow, after the adoption of the appellant, and during his minority, remained in possession of the zemindary.

The death of zemindar took place in 1835. The lady seems, years after the adoption, to have repented of what she had done, to have endeavoured to repudiate the act, and to have insisted on retaining the possession of the estate against the adopted son after he came of age. In fact, she continued in possession till July 1851.

While she was so in possession, and on the 27th August 1841 she executed the bond in question for 17,000 rupees to Rungasawny Jyengar, the natural father of the respondent.

That this sum was advanced by Jyengar is not disputed; but it is said that it was advanced on the personal security of the widow; that the bond did not purport to bind the zemindary, and that the widow had no power to bind it; that the appellant at that time had attained his majority, and that the widow was holding possession adversely to him, and could not, therefore, as guardian or manager of the estate, charge it with any debt which she might contract.

On the other hand, it is said that the amount of the bond consisted in part of the balance due on a bond executed to the same creditor by the late zemindar himself, the husband of the obligor, in his life-time; and that, as to the remainder, the money was raised to pay other debts of the zemindary, binding the zemindar; that the bond, therefore, constituted a charge on the zemindary, which the appellant, as the owner, was liable to pay, and that he had, in fact acknowledged his liability to do so after he came of age, both verbally and by a letter written in the year 1845, long after he had obtained his majority.

The bond is set out on page 11 of the Appendix, and purports to be made on the settlement of an account between the widow and Jyengar, and to be given for

moneys partly due from the late zemindar, and partly advanced to the widow herself.

The consideration for it is stated to be—

1. A balance due on a bond from the late zemindar, dated in July 1832-33	...	...	Rs. 8,700
2. A balance due on a bond executed by the widow herself on the 27th May 1840	...	...	„ 3,445
3. Cash received by the widow, through Pillay, her agent, on the 19th August 1841	...	...	„ 3,031½
4. Cash received on the execution of the bond	...	...	„ 2,000
Total			Rs. 17,176½

from which the sum of 176½ being relinquished by the obligee, there remain 17,000.

The bond proceeds :—

“This being the amount of debts incurred by my husband and myself, I shall pay the same, with interest at 1 per cent. per mensem, by yearly instalment of 2,000 rupees, payable in cash, from this year, and enter such payment at the foot of the bond.”

The bond itself purports to bind nobody but the widow, and the statement of the account could not, of course, bind the appellant, who was no party to the instrument. On the other hand, it is plain that, from the contents of the bond itself, the appellant, if he saw it, would know for what causes it purported to have been given. But it consisted partly of moneys alleged to be due from his father, and partly of moneys admitted to have been advanced to the widow personally.

Unless those moneys so advanced to the widow personally were advanced to pay subsisting charges on the estate or otherwise, for its advantage, they, of course, could constitute no charge on the zemindary.

There is produced in evidence, and proved, a bond from the late zemindar, dated in 1832, for 5,000 rupees, bearing interest at 12 per cent., on which, after deducting the sums appearing by the bond to have been paid, there would remain due for principal and interest, a sum exceeding the 8,700 rupees, stated in the bond for 17,000 rupees.

This bond of 1832 is proved to have been produced at the time when the bond in dispute was executed, and the amount settled of the sum due to Jyengar.

With respect to the sums advanced to the widow, their payment is regularly proved, and, indeed, that the transaction as between the lender of the money and the widow was a fair one is not in dispute.

As to the purpose for which these advances were made, it is sworn that the widow told the lender that she wanted money to discharge debts contracted by her husband with two persons named, and to pay maintenance to the widow of her husband's elder brother.

The fact that the money was required, and was advanced for these purposes is stated by another witness who had been in the service of the late zemindar, and also of the widow, and who had been acquainted with the circumstances as they occurred.

The same fact is sworn to by other witnesses.

With respect to the evidence generally, it appears to their Lordships to be less open to suspicion than usually happens in appeals from India.

At the time when the debts were contracted for which the bond for 17,000 rupees was executed, and at the time of the execution of the bond, the widow was in possession of the zemindary, and the appellant was living there under her protection.

It is said that the appellant had before this time attained the age of sixteen years—his legal majority—and that he was entitled to the estate, and was wrongfully kept out of it by the widow.

It is not very distinctly proved at what time the appellant attained his majority. That disputes did take place between the widow and the appellant with respect to the right of possession of the zemindary sufficiently appears ; but the period at which they commenced is not in evidence. The important matter is free from doubt ; that during the period of these transactions and subsequently, and up to the time when the letter of the appellant, to be presently referred to, was written, the appellant was living on the zemindary, and had, therefore, probably full means of ascertaining the real truth of the case with respect to these advances.

In this state of circumstances, what took place is quite natural. The appellant was the adopted son of the late zemindar, entitled as it seems to the zemindary ; he was living there, and had attained his majority, and might reasonably be supposed to be in the enjoyment of the revenues.

Accordingly the plaintiff, who considered that the money due to him was a charge upon the estate, applied to the appellant for payment of the amount due on the bond.

It is stated by one of the witnesses (19) that the plaintiff sent him to the defendant to demand of him the said sum, and when he went to Torriore and asked the defendant, he said, "I and my mother are at variance, and I can pay the debt only after we come to some settlement." The witness then says that he went to the widow and asked her, and she sent by her servant Jamboovien 1,000 rupees.

There is nothing improbable in this account. The witness says it happened about fourteen years ago. He was examined in August 1856, and, on referring to the bond, it appears that 1,000 rupees were paid in May 1842.

This statement is confirmed by another witness at page 24, and other applications to the appellant, and similar answers by him, are sworn to by other witnesses.

Nothing is more likely, therefore, than the account which is given in the evidence that, in 1845, 1,000 rupees only having been paid in respect of the bond, a written demand of payment should be made on the appellant ; and that he should make in writing an answer to the same effect with that which he had given verbally on several previous occasions. A letter is accordingly produced and proved, dated the 11th March 1845, with the signature of the appellant, which contains a distinct recognition of the plaintiff's demand, and the same excuse for non-payment, which he had previously offered, *viz.*, that his mother was still in possession of the zemindary ; that the dispute between them was not settled, and that he had, therefore, no power to discharge the debt. He then distinctly states that, on enquiry, he finds that the bond which the plaintiff holds is genuine.

Now, it is said that this letter is a forgery, but there does not appear to their Lordships to be any evidence whatever to support the charge, nor any the least improbability in such a letter, under the circumstances, having been written.

The inference drawn from the evidence in both the Zillah Court and the Sudder Adawlut has been that this bond was given for debts, which the defendant, as owner of the zemindary, might be liable to pay, and that by his own acts he has admitted that he actually was liable to the payment, and their Lordships entertain no doubt that this is the right conclusion.

It is unnecessary, under these circumstances, to allude to the law upon these subjects as laid down by this Board on the case in the 6 Moore, Ind. Ap., 393, with respect to the power of the manager of an estate on the part of an infant to charge it, for no question of law arises in this case when the facts are understood.

Their Lordships will have no hesitation in advising Her Majesty to affirm the decree complained of, with costs.

An objection was taken as to the plaintiff's right to sue on the bond, but that objection was sufficiently answered by the respondent's Counsel at the hearing.

The 13th March 1861.

Present :

Lord Kingsdown, Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel,
and Sir J. W. Colville.

**Zemindary (Perpetual lease of distinct portion of)—Section 8 Regulation XXV.
1802. Madras Code.**

On Appeal from the Sudder Dewanny Adawlut of Madras.

Vencataswara Naicker, Zemindar of Yethapooram,

versus

Alagoomoohoo Servacaren.

A perpetual lease of a distinct portion of a zemindary is not a transfer within the meaning of Section 8 Regulation XXV. 1802, Madras Code.

THIS appeal arises in a suit brought by the respondent to establish a claim to hold in perpetuity, at a fixed rent, certain villages forming part of the zemindary of Yethapooram, which belongs to the appellant.

The Civil Court of Tinnevely, in which the suit commenced, decreed in favor of the plaintiff's title, and that judgment has been confirmed by the unanimous opinion of the Judges of the Sudder Adawlut of Madras.

The zemindary in question is of great extent, comprising above 100 villages ; the claim of the respondent extends to fifteen of them.

The case of the respondent is that he and his ancestors have had some right or interest in those villages, or the district in which the villages now exist, for a very long period, long antecedent to the establishment of the English authority in the country, and that when the English authority was established in 1803 a grant of the whole zemindary, without noticing the rights of the respondent's family, was made at a fixed jumma to the appellant's ancestor.

That in order to secure such rights, without disturbing the grant of the zemindary, an agreement was made in the year 1805 between his ancestor and the then zemindar, by which it was settled that the respondent's ancestor and his descendants should hold the fifteen villages in question on a Cuttoogootagay lease, or, in other words, should hold them in perpetuity at a low fixed rent payable to the zemindar ; and that such rent was fixed at 1,940 pons, being, in fact, the proportion of jumma, which was assessed upon them by the Government.

The respondent alleges that he and his ancestors remained in possession of these villages under this agreement for many years till he was turned out of possession by the appellant in the year 1848.

The case of the appellant is an extremely simple one. He alleges that the case set up by the respondent is a pure fiction ; that the documents which he produces in support of it are mere forgeries ; that the plaintiff's possession began in the year 1814, under a lease on *ijara*, or, in other words, an ordinary tenant-lease, at a rent agreed upon ; that such lease was, from time to time, renewed for different periods, the last of such leases being made on the 29th July 1836, for twelve years, on the expiration of which the plaintiff, having no longer any right to the property, was turned out of possession.

In support of his case, certain instruments purporting to be counterparts of these leases are produced, and it is admitted that, if they are genuine, they are quite inconsistent with the right alleged by the respondent.

There is clearly forgery either on one side or the other ; and both of the Courts below, who had the documents before them, have concurred in attributing the forgery to the leases produced by the appellant.

It would be a strong measure for their Lordships, upon a question of fact to reverse a decision founded, at least in part, upon an examination of the documents themselves, in which all the Judges below came to the same conclusion. At the

same time, cases may exist, warranting such a course, and one was mentioned at the Bar in which this Board did actually adopt it. The question is, whether such a case has been made out by the appellant.

No doubt the *onus* was on the respondent, who was the plaintiff, to prove his case.

Let us see, then, what the evidence on each side was.

The first instrument produced was a deed on copper, dated in 1557, and purporting to contain a grant of the district in question to an ancestor of the respondent. It was produced by the respondent, who was the proper person to have it in his custody, and some objections alleged to exist upon the face of it, as if it had borne to be executed by a person not then enjoying the sovereignty of the country, seem to have been removed by the diligence and exact investigation of Mr. Mackeson.

Many other documents were produced, beginning in the year 1712; and bearing different dates in 1747, 1749, 1777, 1779, and 1789, all showing dealings with the property by ancestors of the respondent.

It is said that there is no proof of these papers; they are all of a date which excludes the possibility of direct proof; but they are proved by the production itself to come from the possession of the plaintiff, and the want of formal proof that they were found in his muniment-room, cannot be regarded as of any importance in a suit of this description.

It is contended, however, that they are, if genuine, inconsistent with the case now made by the respondent, because the original grant appearing to be rent-free, it is improbable that he respondent's ancestor could ever have accepted a lease, charging him with a rent, and yet such is the nature of the lease now set up as the foundation of the respondent's title.

But the documents produced show that, whatever might be the case originally, there was in 1712 a certain tribute payable by the whole zemindary, of which one-sixteenth part was apportioned to the respondent's district.

The Judges below placed no reliance on these documents, not, so far as appears, because they disbelieved their genuineness, which their Lordships see no reason to doubt, but because they held them to be immaterial to the plaintiff's case. They are, however, of some value as matter of inducement, showing the probabilities of the statements made by the opposite parties.

The next document, which the plaintiff puts in evidence, is the instrument on which he rests his claim. It is a paper writing, alleged to be signed on 5th August 1804, by the then zemindar of Yethapooram, and addressed to the ancestor of the respondent in these terms:—

“As I have leased out to you fifteen Cuttoogootagay villages” (it then enumerates them) “attached to Cuttalangolam division, under a deed, for the fixed rent of 1,940 pons, you should, without delay, continue to pay every year the said amount into the Treasury of the Yethapooram Cutcherry, and yourself, your son, and grandson can enjoy the said fifteen villages for ever, paying the kist amount thereof.”

Supposing this document to be genuine, of course, there is an end of the case. It is, however, alleged by the appellant to be a forgery.

The direct evidence in support of it is not very satisfactory; it is spoken to by several witnesses, who profess to have seen it, and to remember its execution nearly fifty years before, on whose testimony, however, no great reliance can be placed; but if the dealing with, and possession of, the estate has been consistent with the instrument, its date sufficiently accounts for the absence of better direct testimony.

The next document, in point, of date, is a mortgage, dated in 1811-12, made by the grandfather of the respondent, to a person named Pillay, of a portion of this property for a term of ten years.

The mortgagee is sworn by two witnesses to have been in possession under this instrument, and, when the debt was satisfied, to have returned the deed to the mortgagor (pp. 94 and 95).

Now, the date of this instrument is more than two years before, as the appellant alleges, the respondent's family had anything to do with the property.

In addition to this, there is the testimony of many old witnesses that the ancestors of the respondent had been in possession of this property for very many years and long before the period assigned by the appellant for the commencement of such possession. The office of *Servegar* appears to be one of authority, implying the command of 100 men, and it is shown to have been held in this zemindary for a very long series of years by the family of the respondent, and it is further shown that the grant of lands in *Cuttoogootagay*, or *Java-tha*, is a usual mode of remunerating such services.

The case, therefore, of the respondent is probable and consistent.

But the evidence goes a great deal farther and shows very clearly, in the opinion of their Lordships, that the title of the respondent has been repeatedly admitted by the ancestors of the appellant.

The lessee seems not to have been very punctual in the payment of his rent, and, in the year 1822, the zemindar found it necessary to apply to the Collector at Tinnevely to enforce payment, and he presented an *urzee* on the 27th November 1822 to Mr. Hudleston, the then Collector.

The *urzee* in question comes from the Collector's office ; it is open to no suspicion, and it is of itself sufficient to disprove the appellant's case, and to afford a strong confirmation of the statements of the respondent.

It is found at p. 101 of the Appendix, and is to this effect :—

“ Fourteen villages in *Cuttalungolam* division, attached to the zemindary, which was obtained by my late father from the Honorable Company, were given to *Alagoo Moottoo Savykaran*, son of *Alagoo Moottoo Sarvykaran*, of the said *Cuttalungoolam*, for his maintenance at a jumma of pons 1,959 a year, which was paid by him, and, after him by his son, *Alagoo Moottoo Sarvykaran*, in fact, up to the 992 *Aundoo* (this date corresponds with the year 1816) ; but, he had entirely discontinued the payment of the same for the *Aundoo* 993 and 994, though he was holding out mere promises whenever demands were made for it ; the balance due by him from the *Aundoo* 994 to 997, amounts to about pons 1,541, and fanams 5½.”

This is a statement, therefore, that the villages had been granted to the ancestor of the respondent for his maintenance at a fixed jumma, and that up to the year 1816 the rent had been regularly paid by the grantee and by his son, and yet it is now pretended by the appellant that the respondent's ancestor first came into possession of the property in 1814, and then under an *ijara* lease. It is clear that this statement refers to the payment of rent for a considerable period, and could not mean a payment for two years. There is evidence, indeed, that the person to whom this grant is said to have been made, and who is represented to have paid rent under it, died in 1808.

The zemindar then prays that the property of *Alagoo Moottoo* may be attached to pay this demand.

There is another document less strong, but, as far as it goes, confirmatory of the plaintiff's case.

It is found in an order, of Mr. Bird, the Collector, made in the year 1845, at which time disputes had arisen with respect to the boundaries of some of the villages in the zemindary, and, amongst others, of villages in the district of *Cuttalungoolam*, the district claimed by the respondent.

This order mentioned that the zemindar had submitted an *urzee*, stating that he had nothing to do with certain lands therein mentioned, “ which are in the enjoyment of the *Merassidars* of *Cuttalungoolam*, to whom he had leased it out under *Cuttoogootagay* tenure.”

There is abundant other testimony in support of the respondent's case, and in direct contradiction of the appellant's, but it is useless to pursue it further. Their Lordships have not the slightest doubt that the Court below could have arrived at

no other conclusion than that the case set up by the appellant was based in fraud and prejury, and that, as far as the facts are concerned, the plaintiff had completely established his claim.

It is hardly worth while to notice the objections taken to the plaintiff's documents.

First it was said that the sum mentioned in the paper of 1805 (1,904 pons, as printed in the records) differed from the actual rent of 1,959 pons and some fanams actually paid.

It appeared, however, very clearly that the 1,904 pons was a misprint for 1,940, and that the difference between 1940 and 1959 odd was accounted for by the addition of shroffage.

The representation of the appellant that the division of the zemindary claimed by the respondent contained only thirteen villages at the period when his title commenced, and that two of them were added afterwards, is clearly disproved by the public accounts for the year 1802, showing that at that time Cuttalangoolam was a known district held Cuttoogootagay, containing the fifteen villages of which it now consists, and was subject to an assessment of 1,000 pagodas.

It is said, however, that whatever may be the respondent's right in point of fact, he is precluded from recovering by an objection of Law, *viz.*, that the plaintiff's title is not registered according to the Madras Regulation XXV of 1802, s. 8; and it is said to have been settled in India that, although an instrument not registered may be good against the zemindar who executed it, the successor is not bound by it.

The language of the Regulation would seem to apply to questions between the zemindar and the Government, and to have been framed with a view of preventing a severance of the zemindary without public notice to the Government. It is not very obvious upon what principle it can be held that an instrument good against the party making it is bad against an heir, if the ancestor had an absolute power of alienation. If the successor is, as we should term it, a remainderman, or claiming by a title, which the ancestor could not defeat, the case, of course, is different.

But their Lordships are of opinion that there is in this case no ground for the objection. This is not an alienation of the zemindary, or any part of it. It is a perpetual lease of distinct portion of the zemindary, which constituted a distinct portion before the appellant's title to the zemindary accrued; and such an estate could not, without great violence to the language, be considered as a transfer within the words of the Regulation. The title of the respondent has been recognized not only by the zemindar, who treated it, but by subsequent zemindars, and there has been a possession under it of above fifty years.

Their Lordships will advise Her Majesty to affirm the judgment complained of, with costs.

The 12th July 1864.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, and Lord Justice Turner.

Bond (by Executor and Guardian)—Kistbundee or engagement to pay by instalments (by Minors)—Adjustment of accounts.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Gholab Khoonwuree Bebee,

versus

Eshur Chunday Chowdry and others.

The appellant made a claim upon the respondents in respect of certain bonds given during their minority by their executor and guardian. On attaining majority, the respondents being desirous of avoiding

payment, were advised that they could only do so by instituting a suit to which the executor must be a party, and in which a settlement of his accounts would be required. But as the executor was their spiritual guide and had been their father's also, instead of instituting a suit against him they thought it better to come to terms with the appellant in order to obtain time for the payment of the debt by instalments; and a kistbundee was accordingly executed. HELD that the respondents could not now, after the death of the guardian, dispute their liability for the payment of the debt which they had thus deliberately undertaken to pay, notwithstanding that no adjustment of accounts had taken place to ascertain the balance really due to the appellant before the grant of the kistbundee.

WE have looked carefully through the papers in this case, and remain of the opinion which we intimated at the hearing, that the decree cannot be supported. Considering the large amount of the sum at stake and the position in life of the respondents, it is difficult to account for their omitting to appear at our bar to maintain the decree, which they have obtained. But, as far as we can discover, the proceedings of the appellant have been regular, and she is entitled, therefore, to call upon us to dispose of the appeal *ex-parte*.

The appellant carries on business as a Banker; in that character she alleges that she made very large payments for the respondents, during the time that they, or some of them, were minors, in respect of jumna or revenue due to the Government from a zemindary belonging to them. These advances are alleged to have been made at the instance of a person who was the guardian of the infants, and executor and trustee under the Will of their father. For these sums, the respondent on taking possession of their zemindary, had given a kistbundee or engagement to pay the amount by instalments; and for one of the instalments so secured, the action in this case was brought.

There appears to be great reason to suspect fraud on the part of the guardian, and some reason to believe that the agents of the appellant were privy to it. There can be little doubt that the lease of the respondents' zemindary which was made by the guardian to a servant of the appellant, and which was disputed by the respondents and surrendered by the lessee, was really made to the servant as the nominee and for the benefit of the appellant. It is very possible that, if the respondents had instituted a suit to take the accounts of this guardian, and, charging collusion between him and the appellant, had investigated the transactions which had taken place, it might have appeared that there was no such sum as was claimed by the appellant justly due to her.

The Judges of the Sudder, who have pronounced a decree in favor of the respondents, seem to have been influenced by reasons of this nature, and to have rested their judgment on the ground that no adjustment of accounts had taken place to ascertain the balance really due to the appellant before the kistbundee was granted.

But we think that this objection under the circumstances cannot be allowed to prevail; for the question whether it would be fit to insist on this adjustment was distinctly brought under the notice of the respondents before the kistbundee was executed, and decided by them in the negative. It is proved by Hurroo Gobind Sen that, when a claim was made upon the respondents in respect of the bonds given by the executor and guardian, they were desirous of avoiding the payment, and consulted him as to the mode of doing so; that they were advised by him that they could only do so by instituting a suit to which the executor must be a party and in which a settlement of his accounts would be required. Now, the executor was their spiritual guide and had been the spiritual guide of their father, and it was not considered proper to institute a suit against him. Under these circumstances it was thought better to come to terms with the appellant, to obtain time for payment of the debt by instalments. The kistbundee was accordingly executed, and the witness says that he considered the arrangement beneficial to the respondents.

There seems no reason whatever to doubt this statement. Hurroo Gobind Sen, who makes it, was in the employment of the respondents, was connected with them by marriage, and was referred to in their answer as one of their agents who ought to have been employed in any business of this description.

It appears impossible to permit the respondents, after the death of the guardian, now to dispute their liability for payment of the debt which they had thus deliberately undertaken to pay.

The kistbundee itself and its registration appear to be regularly proved, payments have been made of some of the instalments, and such payments are endorsed upon the instrument. The account-books of the appellant were produced at the hearing, and the fact of the payments made by her as the consideration, for the bonds given by the executor seems to have been thereby established.

Whatever suspicion may attach to the dealings between the appellant and the executor, it cannot affect the decision of the present suit. We think that the decree of the Zillah Court must be restored, and the decree of the Sudder reversed, and that the appellant must have the costs of the proceedings in the Sudder Court, but we are not inclined to give any costs of this appeal.

We will make a report to her Majesty in conformity with the opinion which we have expressed.

The 12th July 1861.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir L. Peel.

Mahomedan Law—Divorce by Khola—Dowry.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Moonshee Buzl-ul-Ruheem,

versus

Luteefut-oon-Nissa.

According to the Mahomedan law, the non-payment by the wife of the consideration for a divorce does not invalidate the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife and purchased by her. The kholanamah, or the deed securing to the husband the stipulated consideration does not constitute the divorce, but assumes and is founded upon it. The divorce is created by the husband's repudiation of the wife and the consequent separation.

The husband having distinctly alleged a divorce by khola, and relied on two instruments, one an ibranamah (or deed of voluntary release by the wife of her dyn-mohr or dowry), of which there was no satisfactory proof that she ever gave her assent with the knowledge of its contents, and a kholanamah (surrendering the wife's settlement) obtained from her mother by means of cruelty and ill-usage practised on her daughter, to confirm the ibranamah,—Held that instruments so obtained could have no legal effect when used as a defence against the wife's claim to her dowry.

THIS suit was instituted in the Civil Court of the Twenty-four-Pergunnahs by the respondent, Luteefut-oon-Nissa suing as a pauper against the appellant, Moonshee Buzl-ul-Ruheem, to whom she had been married, to recover her "dyn-mohr," consisting of the sum of 10,000 rupees and of 1,000 gold mohurs valued at 16,000 rupees, amounting together to 26,000 rupees.

This sum was payable by the appellant to the respondent in the event of the dissolution of the marriage, and she alleged in her plaint that the appellant had dissolved the marriage by divorcing her. She further stated that two instruments by which she was alleged to have given her dyn-mohr, had been obtained from her by the force or fraud of the appellant, and were of no avail to bar her rights.

The appellant in his answer denied the divorce as stated by the respondent, but alleged that two instruments, one a kholanamah, had been executed by her, by which she released her dyn-mohr, and which deeds he insisted were binding upon her.

The Zillah Judge was of opinion that no divorce, except by khola, had been proved by the respondent, but he held that the plea of the appellant admitted a divorce by khola, and that the instruments set up by him as containing a release of

the dyn-mohr were fraudulent and void, and that therefore the marriage being dissolved, the respondent was entitled to recover her claim, and he decreed accordingly.

This decision by the Zillah Court was confirmed by the Sudder, and from the order of the Sudder the present appeal is brought.

Upon the facts we think that there is little doubt. The question is mainly one of Mahomedan law, and we should not lightly in such a case disturb the concurrent decision of two Courts. But we are quite satisfied that the decision is conformable both to law and to justice.

It appears by that the Mahomedan law divorce may be made in either of two forms—tilacq or khola. A divorce by tilacq is the mere arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dowry or dyn-mohr, and, as it seems, to give up any jewels or paraphernalia belonging to her.

A divorce by khola is a divorce with the consent and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In this case the terms of the bargain are matter of arrangement between the husband and wife, and the wife may, as the consideration, release her dyn-mohr and other rights, or make any other agreement for the benefit of the husband.

It seems that, according to existing usage, a divorce by tilacq is not complete and irrevocable by a single declaration of the husband, but a divorce by khola is at once complete and irrevocable from the moment when the husband repudiates the wife and the separation takes place. In these particulars the two modes of divorce differ.

But there is one condition which attends every divorce, in whichever way it takes place, *viz.*, that the wife is to remain in seclusion for a period of some months after the divorce, in order that it may be seen whether she is pregnant by her husband, and she is entitled to a sum of money from her husband, called her "iddit," for her maintenance during this period.

At the hearing of this case, two points were made by the appellant's Counsel. They insisted, first, that the instruments releasing the respondent's claim under her settlement were valid; and, secondly, that if the kholanamah executed by the wife were laid out of the case, there was no evidence at all of divorce, and then the marriage was not shown to be dissolved; that the respondent could not approbate and reprobate the same deed—insist that it was good for the purpose of establishing a divorce, and bad for the purpose of securing to the husband the price which he was to receive for consenting to it.

This objection, however plausible, is founded on a misconception of the real nature of the divorce. The divorce is the sole act of the husband, though granted at the instance of the wife, and purchased by her. The kholanamah is a deed securing to the husband the stipulated consideration, but it does not constitute the divorce. It assumes it and is founded upon it. The divorce is created by the husband's repudiation of the wife, and the consequent separation. The law might have provided that non-payment of the consideration should invalidate the divorce, but it is clear, as well from the opinion of the Law Officers of the Indian Courts, as from the authorities cited at our Bar, that the law is otherwise.

The non-payment by the wife of the consideration for the divorce no more invalidates the divorce than in England the non-payment of the wife's marriage portion invalidates the marriage.

In this case the husband, while denying a divorce by tilacq, not only did not deny but set up a divorce by khola. He alleged distinctly, in his answer, that the respondent took from him a furruckhuttee (which is a bill of divorcement), that she took from him also the subsistence money of her iddit, and gave him a receipt for it, and that she then quitted his house with the assent and under the care of her mother.

That a divorce, therefore, had taken place was the common case of both parties, and the only question was, whether the husband could insist on receiving the consideration for which he says that he had stipulated.

This must depend on the validity of the deeds which he sets up in bar of the respondent's demand. The dissolution of the marriage being admitted, it is for the appellant to make out that the respondent has given up the rights which *prima facie* result from the dissolution, and upon this part of the case their Lordships have never felt the least doubt.

Two instruments are relied on by the appellant : one an *ibrarnamah*, or instrument by which the wife is made, out of regard and affection for her husband, voluntarily to release to him all claim to her *dyn-mohr*. This instrument purports to have been made on the 16th April 1847. It states that the settlement by which the *dyn-mohr* is secured is in the possession not of the wife, but of her mother ; that the wife, therefore, cannot give up the instrument, and is not aware of what the *dyn-mohr* consists.

There is nothing like satisfactory proof that the respondent ever gave her assent to this deed with a knowledge of its contents, and the admitted facts of the case make it in the highest degree improbable, almost impossible, that she should have done so.

At the time at which this instrument purports to have been made, the husband had married, or was on the point of marrying, a second wife, as by law he was entitled to do. The evidence of one of the witnesses states that the marriage took place either in April 1847, or in the following October ; and from the time of the marriage, and indeed from the time when it was decided upon, their Lordships are quite satisfied on the evidence that the appellant and the respondent were equally desirous of a divorce. Indeed it appears that the second wife stipulated as a condition of her consent to the marriage, that her husband should divorce his first wife. He had the power to do so by *tilacq*, but this would not answer his purpose ; he desired to get rid of his wife, but to retain her dowry, and he prepared this deed, in order that, having procured a release of the dowry, he might exercise his power of divorce. The mother of the wife, however, had possession of the settlement, and refused to give it up, and it seems to have been thought by the husband that it would be impossible for him to establish the *ibrarnamah* unless he could procure a confirmation of it, and a surrender of the settlement by the mother, and divorce by *khola*. For this purpose he had recourse to measures of great cruelty ; he refused to permit the mother to see her daughter, and by a long series of ill-usage, unless there be much exaggeration in the evidence, injured the health and even endangered the life of the respondent. The mother, after repeated applications to the *Foujdarry* Court for the protection of her daughter, at last yielded, and gave up the settlement ; under such circumstances the *kholanamah* was obtained, which professed to confirm the *ibrarnamah*.

The Courts below have most properly held that instruments so obtained can have no legal effect. They can be of no more avail when used as a defence against the claims of the wife than they would have had if the husband were suing upon them as plaintiff to enforce rights secured to him.

Their Lordships are quite satisfied that the judgment complained of is correct, and they, will humbly advise Her Majesty to affirm it with costs.

The 2nd August 1861.

Present :

Lord Kingsdown, Sir E. Ryan, the Master of the Rolls, and Sir L. Peel.

Purchase of putnee (Suit to claim the benefit of a—as benamee).

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Kripamoyee Debia.

versus

Romanath Chowdhry.

Examination of the evidence in a suit brought to recover a putnee-talook as having been purchased benamee for the appellant's late husband.

The simple possession of the title-deeds by the plaintiff (appellant), without satisfactory proof of the mode by which she alleged that she acquired possession of them, was held not to outweigh the ~~other circumstances~~ of the case which strongly preponderated in favor of the respondent.

The sale having taken place in 1836, and no suit having been instituted until 9 years afterwards, this delay was considered a very material circumstance against the appellant; more especially as the death of the person on whose account alone the matter was alleged to have been kept secret, had occurred in 1836.

Another important circumstance connected with this lapse of time was that the suit was not instituted until after the deaths of two persons who could have spoken positively to the truth of the case, and whose evidence was of the greatest value in the determination of it.

In affirming the decision of the Court below, the Judicial Committee adverted to the consideration that the appeal was from unanimous decision on a question of fact in which the Lower Court had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them.

THE question in this appeal is whether the purchase of a putnee-talook made by Juggurnath Roy, on 6th September 1835, was a benamee transaction, that is, whether it was bought with the money of, and in trust for Hurro Kanth Roy, who is now deceased, but whose widow is the appellant. Substantially, the question depends upon whether an ekrar-puttro or declaration of trust, purporting to bear date the 29th Kartick in the year 1242, which corresponds to 14th November 1835, and which also purports to have been executed by Juggurnath Roy, is a real or supposititious document.

We entertain no doubt, if on the evidence it should appear that no reliance is to be placed on this document, that there is no other evidence before us sufficient to establish that the transaction in question was a benamee transaction.

In consequence of the non-payment of the rent, the amount of which was disputed, the putnee-talook was, after various proceedings to which it is unnecessary to advert, sold by the Revenue Authorities, on 21st May 1836, by public auction to Kalee Kanth Lahoree, who was the highest bidder and who has since died, but whose heir is the first respondent on the record.

The suit to recover the putnee talook was first instituted by Hurro Kanth Roy on 1st March 1845; that suit failed in April 1850 by reason of misdating the ekrar in the plaint, which error the Court refused to allow to be corrected.

On 18th July 1850, the appellant filed her plaint in this suit.

On 26th December 1854, the Principal Sudder Ameen dismissed the appellant's suit with costs.

This decision was appealed from to the Court of Sudder Dewanny Adawlut at Calcutta, and, on 28th December 1857, the decree of the Court below was affirmed with costs, which is the decree appealed from to us.

The original kubalah granting the putnee-talook was made on the 22nd Bha-dhoon 1242, which corresponds to 6th September 1835; it was attested by fourteen witnesses, and, at the same time, a kuboolcut, or counterpart, was executed by Juggurnath Roy, containing the usual condition that, if the rent were not paid, the zemindar should be at liberty to sell the talook under the provisions of Regulation VIII of 1819. This counterpart was executed by nine witnesses, of whom the first and last were also attesting witnesses to the kubalah; but the remaining seven witnesses were distinct and different persons.

That the same witnesses, fourteen in number, who attested the kubalah, should be obtained to attest the ekrar, two months later, is circumstance which, in our mind, gives rise to very grave suspicions. No valid reason is given for this peculiarity; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the purpose of attesting another instrument, must have occasioned both difficulty and delay; and it is not pretended that the circumstance of the witnesses who attested both instruments being the same, could confer additional validity on the ekrar. So little did this seem to be a matter of importance to the parties engaged in the transaction on 6th September 1835, that, of the two instruments then simultaneously executed, only two witnesses attested both. The suspicion created by this circumstance is augmented by the consideration that, in the original plaint, which was filed on 1st March 1845, the ekrar is alleged to bear the same date as that of the kubalah. If, in truth, the ekrar had been executed at the same time with the kubalah, it might well be that the same witnesses who attested the lease would also attest the declaration of trust: and, indeed, such a supposition would be natural and probable. Upon the assumption that the original plaintiff had intended to set up a fictitious ekrar with a view of establishing the transaction to be one of a benamsee character, it would be natural to set up an ekrar of even date with the original kubalah, in which case it would be naturally attested by the same witnesses, and accordingly such was the plaintiff's allegation contained in the original plaint; and we cannot but consider it a matter also open to suspicion, in so important a matter as the statement in the plaint of the ekrar on which the whole of the plaintiff's case depended, an erroneous date should have been assigned to that instrument. It is to be observed also, that the ekrar itself, on the face of it, seems to have been framed as if it had been intended to be contemporaneous with the kubalah, for it speaks of the delivering up of the umulnamah, or letter of authority, *of to-day*, that is, of the day of the date of the ekrar; but the only umulnamah of the existence of which any evidence is given, is the umulnamah of the date of the original kubalah.

On the assumption that it was intended to set up a fictitious deed, various circumstances might, after the institution of the original suit, render it impossible to act on that intention, and to establish by proof an ekrar of even date with the original kubalah.

The following are instances:—The witnesses speak of Hurro Kanth Roy as having been present at the time when the ekrar was executed, and even of the conversation which passed between him and Juggurnath Roy on that occasion. Hurro Kanth Roy was, at the date of the execution of the kubalah, distant four or five days' journey off, at Calcutta. This fact might possibly have been established by evidence brought on the part of the defendants. There were present at the time when the kubalah was executed, in September 1835, the witnesses to the kubooleut; and these witnesses, or some of them might have been called, and not only disproved the presence of Hurro Kanth Roy, but might also have disproved the execution of any ekrar at all at that time, and might have given evidence which would have been irreconcilable with the evidence on the part of the plaintiff.

Assuming, therefore, that a fictitious deed was intended to be set up, this circumstance might explain how it was originally intended to set up an ekrar of even date with the original kubalah, and how that intention was afterwards abandoned as far as regarded the date of the instrument.

Another circumstance which creates grave suspicion in our minds is the age of Hurro Kanth Roy at the time of the transaction. This we consider to be proved by the deposition of Hurro Kanth Roy himself, made in a distinct matter on 12th May 1843. By this deposition it appears that he was then at the Government school at Rampore, and that he stated his age to be at that time 17 or 18. This was eight years and nine months after the date of the ekrar. This would reduce his age at the time of the transaction to 9 or 10 years old. The explanation attempted

to be given, that he understated his age for the purpose of entering the school, by the regulations of which no pupil could be admitted who had passed a given age, even if admitted, could only extend to a year or two; but no latitude which could be given to this suggestion, would induce us to believe that a man of 26 or 27 could pass off for a youth of 17 or 18; but we have no reason to doubt the accuracy of the statement of his age contained in the depositions which was made by himself in a matter in which his age was not a matter of importance, and by which it appears he was then under the master of the school, and in which he speaks of the other lads of the school.

We are, therefore, of opinion that, on the evidence before us, the age of Hurro Kanth Roy in November 1835 must be considered as not exceeding 10 or 11 years. In what way a boy of 10 or 11 years of age could be possessed of money sufficient for the purchase of the putnee-talook, the evidence fails to explain.

But this is not the only difficulty presented in the way of the appellant by the youth of her husband at the time of this transaction. The evidence given by the witnesses of the conduct of Hurro Kanth Roy on this occasion is irreconcilable with the supposition that he was not more than 11 years old, even allowing much to the precocity ascribed to Indian youths.

Ram Nedhee Deb (page 106) said that this boy of 10 or 11 years old gave directions for obtaining some of the Rajah's mehal, if any were to be let out in putnee. The witnesses all speak of his understanding the transaction, and taking a part in it.

Gooroo Dyal Roy (page 76) says that Hurro Kanth Roy sent the money for the kubalah, 4,700 rupees in specie, from Calcutta, by him and three other persons, accompanied by five or six others, by a boat; a very improbable mode of transmitting money in a country where Government notes were in circulation.

Kalee Pershad Doss (page 79) says that Juggurnath Roy and Hurro Kanth Roy corresponded on this subject, and that Hurro Kanth Roy wrote letters to Juggurnath Roy on the subject, and they all state that he went from Calcutta to Sydadabad, for the purpose of completing the transaction.

A careful examination of the witnesses also discloses various inconsistencies in their testimony. Two of them, *viz.*, Hurro Dass (page 72) and Gour Mohun Dass (page 75) in their depositions made in the first suit, speak of the ekrar as originating from Juggurnath Roy; but the two witnesses examined in the suit, Ram Nedhee Deb (page 105) and Sheetal Ram Raha (page 108) say that the ekrar was made at the instance of Hurro Kanth Roy.

This latter observation would not have much weight were it standing alone; but combined as it is with the other circumstances enumerated above, it adds to the suspicion necessarily created by the other facts in the case. It is not to be overlooked also that the ekrar was not registered; to this omission, however, little weight would have to be attached, if the whole of the rest of the case were free from suspicion, by reason of the desire to keep the matter secret, which, on the assumption that it was a benamee transaction, and intended to be concealed from Rajah Gobind Chunder, was intelligible enough.

The circumstances above enumerated, if they stood alone, would bring our minds to the conviction that no reliance could be placed on this ekrar in a Court of Justice as an authentic document.

But there is some evidence on the other hand, in favor of the transaction having been originally a benamee transaction. The strongest portion of this is to be found in a letter which, singularly enough, has been produced on behalf of the defendant Kalee Kanth Lahoree; it is, therefore, free from all suspicion when used on behalf of the plaintiff: this is a letter (page 117) written in October 1835, between the date of the kubalah and the ekrar addressed to Juggurnath Roy, apparently by the Maharanee Kishenmonee Takooranee, who was aunt of Hurro Kanth Roy. It seems to have been written in answer to a letter from Juggurnath Roy, requesting

from her directions respecting this putnee, and in it she directs that a mooktearnamah should be made out in the name of Nub Kunt Roy, and coupled with that of Oomapersaud Lahary, to whom the documents relating to the putnee and the kubalah were to be forwarded. This direction to some extent, at least, seems to have been acted upon by Jugguruath Roy, and it is certainly very difficult to reconcile the writing by Juggurnath Roy of the letter to which this was an answer, with the supposition that he was the beneficial owner and purchaser of the putnee-talook. This observation, however, although in favor of holding that the transaction was originally one of a benamee character, does not establish the case of Hurro Kanth Roy, or make out any title in him to the putnee-talook. It may be that the Maharanee was the purchaser of the putnee-talook ; but that is not the case of the plaintiff, or what we have to consider in this appeal. This document has, however, although indirectly, a bearing on the part of this case which is that which is indeed the principal foundation of the plaintiff's case, *viz.*, the presence of all the deeds and papers relating to this putnee-talook, and the wasilat papers during the time which elapsed after the kubalah, and before the sale in May 1836, which are all now in the hands of the plaintiff. This letter of the Maharanee authorizes the delivery of all papers relating to the kubalah to Nub Kunt Roy. Hurro Kanth is stated in the judgment of the Court (page 154) to have resided with Nub Kunt Roy, who predeceased him ; and it is suggested that by this means the original documents may have come into the possession of Hurro Kanth Roy. Whether this be so or not, it will not, in our opinion, affect the ultimate decision of the case.

The mode by which the plaintiff alleges that she acquired possession of these documents is not established to our satisfaction ; and this being so, we cannot allow the simple possession of them to outweigh the other circumstances of the case, which, in our opinion, strongly preponderate in favor of the respondent.

One circumstance, however, and that a very material one, remains to be noticed, and which makes strongly against the claim of the appellant ; and this circumstance is, that the sale having taken place in May 1836, no suit is instituted until March 1845, a period of nine years. This circumstance is the more noticeable, because it appears that the Rajah Gobind Chunder, on whose account alone the matter is alleged to have been kept secret, had died in November 1836, thereby releasing Hurro Kanth Roy from the fear of his making any claim to the putnee-talook, the apprehension of which is alleged to have been the cause of the benamee.

Another circumstance, connected with the lapse of time, is also most important, for the suit was not instituted until after the deaths of both Juggurnath Roy and Nub Kunt Roy had taken place, and they were the persons who could have spoken positively to the truth of this case, and whose evidence was of the greatest value in the determination of it.

Taking all these matters into consideration, and also bearing in mind that this is an appeal from the unanimous decision of the Court below on a question of fact in which they had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them, we are of opinion that the decision of the Court below ought to be affirmed ; and their Lordships will humbly recommend Her Majesty to dismiss the appeal with costs.

The 2nd August 1861.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner,
and Sir L. Peel.

Joint Hindoo Family (Illegitimate children of Christian father by different
Hindoo women)—Succession—Inheritance—Collaterals—Partition
—Appeal from part of a decree)—Reference to Law Officer
(on questions of right and title).

On Appeal from the Sudder Dewanny Adawlut at Madras.

Myna Boyee and others, *

versus

Oottoram and others.

Illegitimate sons of a Christian father by different Hindoo women, although by agreement they constituted themselves parceners in the enjoyment of their property after the manner of a joint Hindoo family, are not a joint Hindoo family according to Hindoo Law. On the death of each, his lineal heirs representing their parent would, by the effect of the agreement, enter into that partnership.

Quære.—Whether the Hindoo Law gave a right of inheritance to collaterals.

In a partition suit instituted by one of the illegitimate children, a deed of compromise was executed by the parties which provided for the mode of enjoyment, and against the sale, mortgage, lease, or security of any separate share. **HELD** (1) that these provisions of the deed did not extend to prevent alienation by devise, nor affect the right of inheritance; and (2) that the arrangement between the parties included the right of survivorship, the claim of the State only arising on failure of heirs of the last survivor.

In an appeal from part of a decree, the whole decree is not open to the respondents. Under the peculiar circumstances of this case, however, leave was given to present a cross appeal, and the appellants not objecting, the appeal was heard from the whole decree.

Every reference in a suit to Law Officers, likely to bind a right should embrace all important facts proved or admitted in the cause which may affect the conclusion; and it is the duty of the Court itself so to frame the question as to elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained but are stated and disputed, the questions should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of approved text-writers, those who give the opinion should be asked further to explain that which appears *prima facie* thus irreconcilable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

THE facts of this case, so far as they are material to the questions we have to consider, lie in a narrow compass. Mr. George Arthur Hughes, an Englishman, living in India, had two illegitimate children, named Ramaprasad and Taukooram, by a native woman, a Hindoo, who appears to have been a married woman, to have deserted her husband, and to have lived in adultery with Mr. Hughes. This woman appears to have been originally of one of the privileged classes, and not of the Sudra class. Mr. Hughes had also three other illegitimate children, Myaram, Chundoolaul and Oottoram by another native woman. By his Will he devised the estate of Kadalkoody to his five illegitimate children in equal shares, to each a fifth share. The children appear to have been brought up as Hindoos, and to have lived at first as an united family, but some time after Mr. Hughes' death, Ramaprasad, the original plaintiff in the suit from which this appeal arises, instituted a suit for partition, and obtained a decree accordingly. There was an appeal from this decree; and pending this appeal the parties compromised, and a razeenamah, or deed of compromise, was entered into between them. This deed, to which four of the children, one of whom, Chundoolaul, had purchased the share of Oottoram, the fifth of the children, who had died, after reciting the Will of Mr. Hughes and the above-mentioned purchase, proceeded as follows:—

“ Of the said Kadalkoody paliaput, the share assigned to the third appellant by Mr. Hughes Will is one-fifth, and this added to the one-fifth share purchased by him as stated above, makes his total share two-fifths of the whole estate. The share assigned to the second appellant Myaram under the said Will is one-fifth, and that left to the first appellant Taukooram and the respondent Ramaprasad by the said instrument is one-fifth each. Thus it having been settled that we four should enjoy the said zemindary in five shares, we have entered into the following agreement, *viz* : That from Fusly 1254, the management of the entire zemindary shall, for life, be

entrusted to one of us four, *viz.*, Taukooram, the other three abiding by this arrangement. That the paishcush, amounting to rupees 4,469 8-0 per annum, shall be punctually paid by Taukooram from and out of the income of the paliaput for each Fusly, the mrsal or remittance being made in the names of us all four. That all the repairs necessary to the paliaput shall be executed by him every year, at an annual outlay of 500 rupees, he taking care that the money is properly spent. That of the surplus left of each year's income, after defraying the paishcush, charges of repairs, and costs of establishment of that year, Taukooram shall pay to Myaram and Chundoolaul whatever may fall due to them for their said three shares as per accounts. That, on account of the one-fifth share of Ramaprasad, Taukooram shall, for his life, pay into the Treasury of the Court, the fixed sum of 1,300 rupees a year, a moiety thereof being payable on 11th April, and the other moiety on the 11th July of each Fusly. That Ramaprasad, or the heirs appointed by him, shall receive the said sum from the Court. That, should the income of Ramaprasad's said one-fifth share for any year exceed the fixed amount above referred to, such excess shall be appropriated by Taukooram. That should the income of the said share fall short in any year of the fixed sum above referred to, Taukooram himself shall make good such deficit. That Taukooram shall be entrusted with the title deeds of the said paliaput, and any sharer shall be at liberty to refer to them whenever he wishes. That should the accounts furnished by the Ameen deputed to attach the paliaput exhibit any old balance outstanding for Fuslies 1251 to 1253, during which period the paliaput remain under attachment, Taukooram shall recover the same and pay to Ramaprasad his one-fifth share thereof, taking a receipt from him. That, the other sharers also shall receive their shares of the said balance in the same manner. That after Taukooram's death Ramaprasad, or the heirs appointed by him, shall have the management only of his one-fifth share, subject to profits or loss. That the management of the other four shares shall be entrusted to Myaram or Chundoolaul, or their heirs or representatives, appointed by them. That the ryots, kurnums, servants, &c., of the paliaput, shall pay to the other sharers, when they go to visit the estate, the very same respect that they would show to Taukooram or persons entrusted with the management after his life-time. That the paliaput shall never be divided, but only the income thereof, of which each sharer shall receive and enjoy his share with reference to accounts of income and expenditure. That neither the sharers, nor their heirs or representatives appointed by them, shall alienated their respective shares by sale, mortgage, lease, or security; all such transactions, if effected, being null and void."

In pursuance of the arrangement made by this deed, Taukooram had the management of the estate during his life, and paid to Ramaprasad the annual sum stipulated for by the deed. On 21st January 1852, Taukooram died intestate and without having had issue; and, on his death, Chundoolaul took possession of all his real and personal estate, including his one-fifth part of the Kadalkoody estate. The plaint in the suit which has given rise to the appeal before us, was filed on 8th September 1852, by Ramaprasad claiming as the heir of Taukooram, against Chundoolaul for the recovery of the real and personal estate of Taukooram. The defendant, Chundoolaul, by his answer in the suit amongst other grounds of defence, which are not material to be mentioned, stated that, in the partition suit, the plaintiff had declared that he was not related to Taukooram; that if they were co-parceners, they were so through their father and not through their mother; and that the Hindoo Law was not applicable to them. That each of them having received a certain amount of property under Mr. Hughes' Will, their interests were distinct, and one of them had nothing to do with another's portion; that that was the status in which Ramaprasad had in the partition suit, prayed the Court to place him; and that the decree in that cause was that the parties were not amenable to the Hindoo Law, and he insisted that in the teeth of these proceedings in the former suit, it was not open to the plaintiff to claim Taukooram's share of the estate of Ramaprasad; he relied also upon the razeenamah, insisting that Taukooram's intention that his share of the Kadalkoody estate should on his death pass to him, the defendant, was evident from the fact of that instrument containing a detailed provision that Taukooram's share, and the management of the other four shares of the estate, should be held in succession by the defendant and his heirs, or other persons appointed by him; he also set up a mookteernamah and a Will alleged to have been made by Taukooram in his favor.

The plaintiff, by his replication, explained the allegations made by him in the partition suit, and denied that they bore any such meaning as was imputed to them by the answer.

The rejoinder was a mere recapitulation of the answer ; and the only material evidence in the cause was, on the part of the plaintiff, the razeenamah, and on the part of the defendant, the mooktearnamah, and the Will, with the depositions of some witnesses in support of those instruments. There was no evidence as to the plaintiff's title as heir ; but upon this point the following question appears to have been submitted to the Pundit of the Court of Sudder Adawlut :—

“ You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother ? ”

And to this question the following answer appears to have been returned :—

“ If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother.”

Upon the hearing of the cause in the Zillah Court, the Judge was of opinion that the mooktearnamah and the Will were forgeries, and that the provisions of the razeenamah had reference to the management of the estate, and did not affect the right to it ; and resting upon the opinion of the Law Officers, he treated the allegations in the partition-suit as irrelevant, and considered the plaintiff's title as heir to be established. The decree of the Zillah Court, therefore, was wholly in favor of the plaintiff.

From this decree the heirs of Chundoolaul, who had died in the meantime, appealed to the Court of Sudder Adawlut ; but the Judges of that Court were also of opinion that the mooktearnamah and the Will were not genuine documents ; and as regards the right of the plaintiff to inherit the property of his uterine brother Taukooram, they were of opinion that those persons must be looked upon as Hindoos, and subject to Hindoo Law ; and the question as to the Hindoo Law of the case having, as they thought, been fairly put to the Pundits of the Court, they considered that the plaintiff had a right to inherit the property of Taukooram. They accordingly, by a decree dated 7th November 1856, affirmed the decree so far as respects the estate of Taukooram not included in the razeenamah ; but as to the one-fifth part of the Kadalkoody estate, which was included in the razeenamah, they were of opinion that the intent of that instrument was, that the right of the plaintiff should be confined to the enjoyment of his own one-fifth share and the management thereof, and that the right and title to the management and enjoyment of the profits of the other four shares was vested in the other shareholders ; and they accordingly held that the plaintiff was not entitled to recover the one-fifth share of the Kadalkoody estate, which belonged to Taukooram, and reversed that part of the decree which awarded that share to the plaintiff.

The plaintiff, however, afterwards obtained, as it would appear, *ex-parte*, an order for the case to be re-heard, but he died soon after the making of this order, without having had issue.

By his Will, which appears on these proceedings to have been disputed, he devised the Kadalkoody estate to the now appellants, and appointed two of them to be his executors. They accordingly revived the suit ; and the Sudder Court having subsequently, by an order dated 12th November 1857, discharged the order for re-hearing upon the ground that the case was more proper to be the subject of appeal, they obtained leave to bring, and have accordingly brought, this appeal, which is from so much of the decree of the 7th November 1856 as reversed the decree of Lower Court so far as it awarded to the plaintiff Taukooram's share of the Kadalkoody estate, and also against the order of the 12th November 1867.

With respect to the objection raised by the answer that the appellant was precluded by reason of the allegations made by him in the partition suit, their Lordships are of opinion that no weight is due to that objection. The allegations referred to could, at the highest, operate only, under the circumstances of this case,

as an admission against title, on a particular view of the legal status of the party, in point of law, which, if it were erroneous, ought not to have bound the party in another suit for a different object, the Court having before it all the facts relating to the true status.

The immediate question raised by this appeal, therefore, is whether the Sudder Court was right in the construction which is put upon the razeenamah. Their Lordships find themselves unable to agree with the Sudder Court upon the construction of this deed. The deed had its origin in the partition suit. The result of that suit and of the decree which had been made in it, if carried out would have been to sever, at all events, one-fifth of the estate, and to destroy, to that extent at least, not only all unity of interest but all power of joint management.

The deed appears to have been framed for the purpose of avoiding these results. It provides that there shall be no sale, mortgage, lease, or security of any separate share; that during the life of Taukooram he shall have the management of the whole estate, Ramaprasad receiving a fixed income; and that, after his death, Ramaprasad shall have the management of his fifth, and the management of the other four-fifths shall be entrusted to Myaram or Chundoolaul; but these provisions point to management, and to management only. They affect the mode of enjoyment, not the right of property. That right does not appear to be affected by the deed, otherwise than by the particular provisions against alienation—provisions which, it is to be observed, are carefully limited by the deed, and do not extend to prevent alienation by devise, for it is plain that the deed contemplates that each co-sharer might devise. It is scarcely possible to suppose that it could be intended that the right to devise should be preserved, but that the right of inheritance should be taken away. Failing this argument upon the construction of the razeenamah, the respondents contended that the title of the appellant was nevertheless defeated by that instrument. They argued that all the illegitimate sons were to be considered, as they were considered, and, as it appears to their Lordships, rightly considered, in the Courts in India, to be Hindoos; and that the sons, except Ramaprasad, having continued in common, Ramaprasad could not, by the Hindoo Law, be entitled to any portion of Taukooram's share.

This argument renders it necessary to consider what sort of a partnership was constituted by the actual agreed union of the other sons. They were not an united Hindoo family in the ordinary sense in which that term is used in the text-writers on the Hindoo Law; a family of which the father was, in his life-time, the head, and the sons in a sense, parceners in birth, by an inchoate though alterable title; but they were sons of a Christian father by different Hindoo mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindoo joint family. On the death of each, his lineal heirs, representing their parent, would, by the effect of the agreement, enter into that partnership; collaterals, however could not so enter by succession, unless the Hindoo Law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not, by their agreement, give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindoos, would come in only on failure of the heirs.

A further suggestion was made on this part of the case, that, from the peculiar status of the parties, it was to be presumed that the intention of the instrument was to bar the State by the arrangement between the parties, *inter se*, as to the enjoyment of the property; but no such intention is to be collected from the instrument, or is disclosed by the evidence; and it may be added that the arrangement for the parties continuing in common, would, as already observed, include survivorship, and that it could, therefore, only be on failure of heirs of the last survivor that the claim of the State could arise. The instrument too in its dealings with the management, contemplates the existence of *hæpedes facti* and

the parties, therefore, cannot but have been aware that they had in their power the means, of protection against any claim of the State. So far, therefore, as the immediate question raised by this appeal is concerned, their Lordships are of opinion that the decree complained of cannot be maintained.

A further question was also raised on the part of the respondents, whether the appeal, although from part of the decree only, did not open to them, the respondents, the whole decree. Their Lordships were of opinion that it did not, but they thought that under the circumstances of this case, leave should be given to present a cross-appeal, and the appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole decree should be considered as open.

The whole case as to the mooktearnamah and the Will, and as to the appellant's title as heir to Taukooram, was thus open to the respondents. Nothing was said by them as to the mooktearnamah or the Will, and it is unnecessary, therefore, to refer further to those documents, which no doubt were forged. The contention was as to Ramaprasad's title as heir. This title appears to have been affirmed by both the Courts in India, upon the faith of the opinion given by the Law Officers. It does not appear to have been further investigated or enquired into.

The correctness of this opinion was questioned by the respondents, who objected to the mode in which the question was submitted to them; but the Court declined to take another opinion, and adopted the opinion of these officers, apparently without noticing its inconsistency with the ordinary text expositions of the Hindoo Law. The question submitted to the Law Officers does not include some important facts which existed in this case. Every such reference in a suit, where it may bind a right, should embrace all important facts proved or admitted in the cause, which may affect the conclusion; and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained, but stated, and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcilable with the opinions of approved text-writers, those who gave the opinion should be asked further to explain that which appears, *prima facie*, thus irreconcilable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

In this case it was very important to point out to the notice of the Law Officers that the mother of the plaintiff and of his uterine brother was a wife living in adultery—originally, as above-mentioned, one of the privileged classes; that her sons were adulterous issue; that the property had never been the mother's, but had been bequeathed by the father, an Englishman, to his sons, as his sons, and was meant by him to be a parental provision for his children. It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as collaterals *inter se*.

On the terms of the answer, the Law Officers may have considered the case merely as one of succession amongst Sudras proper, and may have acted simply on a wider view of the law of succession amongst Sudras than the written text authorities afford. They may have viewed it as enlarged by some general custom there prevalent extending the law, according to the principles of the Hindoo Law which would support such custom, if, in fact, such custom has obtained.

It is, however, impossible to treat these sons as the sons of a Sudra father; if the appellant and Taukooram be viewed as the sons of a Sudra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not in proof.

If amongst Sudras proper, a course of decisions, or other evidence of the prevalence of a general custom supported a heritable capacity of illegitimate Hindoos beyond that which the writers' text-books established, these decisions have not been made known, nor has that custom been established. But a title such as the present, so wholly irreconcilable with the expositions of any text-writer, and unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship *inter se* to property which never was their mother's, would be at variance with legal principles.

Their Lordships have accordingly felt some difficulty in dealing with this part of the case. On the one hand, they are not prepared to fact upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinion of the text-writers on the Hindoo Law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, more especially with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken, is to remit this question to India for further investigation and consideration.

In the course of the argument on the part of the respondents, an objection was taken on their behalf to the title of the appellants as the heirs of Ramaprasad; but this objection does not appear to have been entertained or considered by the Sudder Court, and their Lordships very much doubt whether it is competent to the respondents to raise it upon this appeal having regard to what must have been done in the cause.

Their Lordships, therefore, taking the whole case into their consideration, delivered the foregoing judgment at the close of the sitting after Trinity Term, but they ordered their report to stand over until after the long vacation, in order that the Minutes might be fully considered by their Lordships and by Counsel; and the matter having been again brought before their Lordships on 26th November 1861, the following Minute was finally settled by their Lordships, with the assent of Counsel on both sides, on 30th November 1861:—

“The appellants having by their Counsel consented that the rights of the parties should be considered and dealt with in the same manner as if the respondents had presented a cross-appeal confined to the subject matter of this appeal, *viz.*, the share of Taukooram in the Kadalkoody estate, their Lordships humbly recommended to Her Majesty that the decree of the Sudder Court of 27th November 1856, be reversed, in so far as the same is complained of by the appeal, and that the appeal be dismissed in so far as it complains of the order of 12th November 1857, and that it be declared that the razeenamah in the pleadings mentioned does not prejudice or affect the appellant's claim to Taukooram's share of the Kadalkoody estate, and that the mooktearnamah and the Will in the pleadings also mentioned were not genuine instruments; and that it be also declared that the aforesaid reversal of the said decree of the Sudder Court shall not, in any way, prejudice or affect the right of the respondents to contest the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate upon any other grounds than those above mentioned, nor prejudice any objection which may be now open to the respondents, and which they may be advised to take, to the title of the appellants as the heirs of Ramaprasad to the said share of Taukooram in the said Kadalkoody estate, and to any application they may be advised to make to the Sudder Court respecting the same; and that it be ordered that the Sudder Court do make all such further enquiry as may be proper and necessary as the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate, and do proceed in the cause as respects that property according to the result of such inquiry, and that it be further ordered that, if it shall appear that Ramaprasad was entitled as the heir of Taukooram to the said share of the

Kadalkoody estate, and that the appellants are entitled thereto in right of Ramaprasad, the costs of this appeal be paid by the respondents, and the whole costs in the Sudder Court also be borne by them except the costs of the application for review as to which, in that event, there should be no costs; but that, if it shall appear that Ramaprasad was not entitled as the heir of Taukooram, or that the appellants are not entitled, in right of Ramaprasad, to the said share of the Kadalkoody estate, the whole costs of the case in the Sudder Court be dealt with as the said Court may direct, and that in that event there be no costs of this appeal."

The 27th November 1861.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge
Sir L. Peel, and Sir J. W. Colvile.

Appeal to Privy Council—Valuation of—Compliance with Stamp Regulation—Evidence.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Mohun Loll Sookul and others,

versus

Debee Doss Dutt and others.

In this case the Privy Council originally gave leave to appeal, provided satisfactory evidence were supplied by the appellants to the Registrar to the Sudder Court that the real or market value of the land in dispute exceeded 10,000 rupees. This order was subsequently discharged as obtained upon an incorrect statement of the facts. It appearing afterwards that the appellants had satisfied the Registrar that the real or market value of the land exceeded 10,000 rupees, the appeal was restored with a general suggestion that the terms of the Bengal Stamp Regulation X. of 1829, upon the subject of value should be carefully attended to.

The respondent asked that she might be at liberty to go into evidence on the question of value. This was refused, the original order having been carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation of a contested issue on the question of value—a result which ought in all cases, as far as justice will permit, to be avoided.

In this case leave to appeal was granted by an order of the 22nd February 1860; but it was provided by the order that the leave to appeal should be null and of no effect, unless satisfactory evidence should be supplied by the appellants to the Registrar of the Sudder Court, that the real or market value of the land in dispute exceeded the sum of 10,000 rupees. By an order of 26th June 1861, the order of 22nd February 1860 was discharged. The application now before us is to restore the appeal, and to discharge the order of 26th June 1861, with costs.

The petition on which the order of 22nd February 1860 was made, alleged that the real or market value of the land in dispute exceeded the sum of 10,000 rupees, the prescribed limit under which the Sudder Court has no power to grant leave to appeal; but that the amount laid in the plaint as the value of the suit for the fiscal purposes being only 3,572 rupees 10 annas 9 pies, three times the amount of the Sudder jumma, or rent, the petitioners were prevented by the rules of practice of the Sudder Court from obtaining therein the leave to appeal.

The petition on which the order of 26th June 1861 was made, alleged that the respondent, in her answer, insisted that the suit ought to have been valued according to Regulation X. of 1829, that is, at the real or market value of the land, and that the appellants after this answer filed a supplemental plaint, stating that the suit had been, by mistake, valued at three times the sudder jumma, and that it should have been valued at 4,300 rupees, the real or market value of the land, but that the stamp being sufficient to cover a claim of 5,000 rupees, no objection could exist on that head; and this petition further stated that the petition on which the order of 22nd February 1860, was made, had omitted to state the respondent's answer and the supplementary plaint, and it also stated that the real or market value of the lands did not exceed the sum of 10,000 rupees.

In this state of circumstances, it was of course, to discharge the order of 22nd February 1860, that order having been obtained *ex-parte*, and appearing to have been obtained upon an inaccurate statement of the facts, and the order was discharged accordingly: but it being considered that there had been no intentional misrepresentation on the part of the appellants, the order of 26th June 1861 by which it was discharged, was made without prejudice to any further application by the appellants on notice to the respondents.

The case, therefore, now comes before us unprejudiced by what passed on the previous applications, and it now appears that the supplementary plaint did not allege the 4,300 rupees to be the real or market value of the land, but stated it to be the auction-price of the land, referring, of course, not to any then present auction, for there was none, but to some past auction at which the property had been bought, and meaning, no doubt, to refer to the auction mentioned in the plaint; and it further appears that the appellants have laid before the Registrar of the Sudder Court satisfactory evidence that the real or market value of the land exceeds 10,000 rupees.

As the case now stands, therefore, there was no fraud practised upon this Court in obtaining the order of 22nd February 1860, and the condition on which that order was granted has been fulfilled. There would seem, therefore, *prima facie*, to be no ground for now refusing to restore the appeal.

But it was said for the respondents that the value of the land in dispute was untruly stated in the plaint in fraud of the Revenue Laws of India, and that leave to appeal ought not, therefore, to be granted. Their Lordships are far from saying that, if they were satisfied that any such fraud was intended, they would be disposed to grant the least indulgence to any party in any way participating in it, but in this case they are satisfied that whatever misapprehension there may have been, there was no such fraud intended. It was a mistake on the part of the Court no less than of the appellants, to allow the cause to proceed upon such a representation of the value as was contained in the supplementary plaint, and their Lordships take this opportunity of suggesting that the terms of the Regulation upon the subject of value should be carefully attended to. They think that, as this case now stands, the order applied for cannot be refused upon the ground suggested.

It was asked by the respondent that she might be at liberty to go into evidence on the question of value; but their Lordships are not disposed to deviate in this respect from their original order, which was carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation of a contested issue on the question of value, a result which, in their Lordships' judgment, ought, in all cases, as far as justice will permit, to be avoided.

The petition before us asks that the order of 20th June 1861, may be discharged with costs, but their Lordships think that there should be no costs on either side.

The order, therefore, which their Lordships will humbly recommend to Her Majesty to be made on this application, will be simply to discharge the order of the 20th June 1861, and to restore the appeal.

The 5th December 1861.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Limitation (Clause 4, Section 18, Regulation II, 1802, Madras Code)—Irregular proceedings of Court—Practice of Privy Council (in reversing decisions)—Evidence (Admission of authenticated copies of public documents by the Courts of India.)

On Appeal from the Sudder Dewanny Adawlut at Madras.

Naragunty Luchmedavamali,

versus

Vengama Naidoo.

A suit is not barred by limitation under Clause 4, Section 18, Regulation II, 1802, of the Madras Code if the plaintiff prefers his claim within the prescribed period to a Court of competent jurisdiction, and is prevented from commencing his suit in proper time, (if, in point of fact, it is not commenced in proper time) by no neglect on his part, but by the irregular proceedings of the Court to which his claim is preferred.

It is not the habit of the Privy Council, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges, there have usually better means of determining questions of this description; and when they have all concurred in opinion, it must be shown very clearly that they were in error, in order to induce the Privy Council to alter their judgement.

The Native Courts of India, in receiving evidence, do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document, authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further enquiry if it were disputed.

Two questions were argued before us in this case :

1st.—Whether the plaintiff in the suit had established his claim.

2nd.—Whether his suit was commenced within such a period after the accrual of his title, that the Court was warranted in entertaining his demand.

The subject of dispute is a Polliam called Naragunty, in the District of Chittoor, in the Province of Madras.

In order to make the facts of the case and the bearing of the evidence more clear, it may be convenient to state what is the nature of a Polliam.

A Polliam is explained in Wilson's Glossary to be "a tract of country subject to a petty Chieftain." In speaking of Polygars he describes them as having been originally petty Chieftains occupying usually tracts of hill or forest, subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent; but as having at present, since the subjugation of the country by the East India Company, subsided into peaceable landholders. This corresponds with the account read at the Bar from the Report of the Select Committee on the affairs of India in 1812. A Polliam is in the nature of a Raj: it may belong to an undivided family, but it is not the subject of partition; it can be held by only one member of the family at a time, who is styled the Poligar, the other members of the family being entitled to a maintenance or allowance out of the estate.

The Polliam in dispute, at the time when the East India Company acquired the sovereignty of the District in 1802, was held by a family of the name of Naidoo. Possession of this and of several other Polliams in the same neighbourhood was assumed by the Company, and held by them for several years. They ultimately, however, restored the Polliam Naragunty to the Naidoo family, different members of which were at different times, Polygars, and in 1837, Vencatappa Naidoo died in possession of the property.

He died without male issue, and the present appellant, who was his widow, entered into possession, asserting title as heir of her late husband.

The present suit was instituted by the respondent and by his father, Kooppy Naidoo, who is since dead, for the purpose of recovering possession of the Polliam from the widow.

The case which they made, was that the Polliam was ancestral property, that it belonged to the family of Naidoo, that the family was undivided, and that on

the death of the last possessor, the right to it vested in the next male heir of the family in preference to the widow, and that they (the respondent's father and the respondent) were such male heirs, Kooppy Naidoo being next male heir.

The Pundit consulted by the Court as to rule of Hindoo Law on the assumption that the plaintiffs had established their allegations by evidence, was of opinion that they were entitled to succeed. This view was adopted by the Court below, and no objection to the decision upon this point has been urged at our Bar.

Both parties went into evidence as to the facts; and the Zillah Court first, and the Sudder Court afterwards upon appeal, were of opinion that plaintiffs had sufficiently proved their case, and no difference of opinion existed amongst the Judges below.

It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the the Courts of India, merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment; but in this case we think that the Courts could have come properly to no other conclusion than that at which they arrived.

The points to be established by the plaintiffs were, that the Polliam of Narguntty was an ancestral property; that it belonged to a family of which they (the plaintiffs) were members, of which the respondent's father was the next male heir; and that the family was undivided.

The appellant by her answer had stated "that it was unknown whether any relationship existed between the ancestors of the plaintiff and those of the respondent's husband, and even if it did exist, it might have become extinct in course of time; but that one thing was certain, that the plaintiff and the defendant's late husband were not members of an undivided family."

The plaintiffs, amongst other evidence, produced a document which, if it be genuine and correct, establishes beyond doubt that the plaintiffs and the appellant's husband were members of the same family; that the property was ancestral, that it had been enjoyed at different times by members of the elder branch to which the appellant's husband belonged, and by members of the younger branch to which the plaintiffs belonged, and that the family at the date of this document was an undivided family. We allude of course to the document at p. 84, No. 124, professing to be a copy of a paper in the custody of the Collector of Chittoor, sent to his office in Fusly 1211, corresponding with 1802 of our era.

It cannot be doubted, and was indeed hardly disputed by the able Counsel for the appellant, that if the statement contained in this paper is to be taken as true, it goes very far towards establishing the case of the respondent; but it was said that it was a mere loose paper, the possession of which by the Collector was not satisfactorily accounted for; that the original had not been produced; that it did not appear to have any signature attached to it, and that it ought not to have been treated as of any authority.

But on enquiry it turns out that the circumstances under which the paper was lodged in the Collector's office are such as to give it the very highest authority.

When the East India Company took possession of these Polliams, as we have mentioned, in the year 1802, they made allowances out of the proceeds to the families of the Polliagars, and contemplated the restoration at a future time, when order should have been established in the country, of the property so seized, to its owners.

They thought it advisable, in order to give effect to these views, to procure and forward a statement of the particulars of the property so seized, and of the names and families of the existing Polliagars.

They required, therefore, Returns to be made by the Polliagars of these particulars. The paper in question purports to be a copy of the Return made on

this occasion by Anantappa Naidoo, who then held the Polliam. The appellant, in her petition of appeal to the Sudder, admits that such a genealogical table may have been given, but denies that there is any evidence that such table was the same as to its contents with the one filed by the plaintiffs.

But the accuracy of the copy so produced, and the genuineness of the document, are made out beyond all controversy.

It was not brought forward by surprise, nor received by the Court without full investigation.

On the 5th January 1855, the plaintiffs made a motion to the Court in the following terms :—

“ No. 121.

“ To the Civil Court of Chittoor.

“ Motion presented by Vencatacharry, Vakeel on behalf of the plaintiffs, in Original Suit No. 24 of 1850.

“ The plaintiffs being the legal heirs to the Polliam have brought this suit for the recovery thereof, with mesne produce. The defendant utterly denies in her answer that they are in any way connected with the family. Soon after the country was brought under the British rule, there was a Circular Order issued requiring all Zemindars to present genealogical tables, showing which of their ancestors held their zemindaries. In compliance with this requisition, the plaintiff's ancestor also sent to the Collector of Chaittoor, in Fusly 1210 or 1211, a statement of the above description ; and this document is now on the records of the Collector, and it is material to the plaintiff's case. In the same office, there is also a statement, showing the average income of the Polliam for ten years, prepared when the Paishcush thereof was fixed by Government.

“ The plaintiffs pray that the Court will be pleased to grant a certificate requiring the production of those documents, in order that they may submit them, with their application, to the Collector for copies thereof.

“ 5th January, 1855.”

Having procured a copy of this document, authenticated by the signature of the Collector of Chittoor, they submitted it to the Court on the 30th January 1855.

The Native Courts of India, in receiving evidence, do not proceed according to the technical rules adopted in England, and they would, by their usual practice admit a copy of a public document, authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further enquiry if it were disputed.

The accuracy of this copy was disputed by the respondent, and on the 13th of March 1855, she made a motion in the following terms :—

“ No. 125.

“ To the Civil Court of Chaittoor.

“ Motion presented by Vencatacharry, Vakeel on behalf of the defendant, in Original Suit No. 24 of 1850.

“ 1. The plaintiffs, with their Motion No. 58, presented a copy of an alleged genealogical table, in which the name of the first plaintiff is inserted as a member of the family. This is a document concocted by the plaintiffs themselves, and introduced into the Collector's Record. For if this were a genuine voucher, the defendant's father-in-law would not have declared, in an Arzee, addressed by him to the Collector when he adopted the defendant's husband, that he had neither uncles nor uncle's sons. Moreover the said genealogical tree neither bears the signature of the party who addressed, nor is attested by the then Collector.

“ The defendant prays that the Court will, on a consideration of these objections, reject the above document, and pass a just decree.

“ 13th March, 1855.”

Hereupon the Court directed a letter to be sent to the Collector on the 31st March 1850, “ requesting him to send up to this Court his Record-keeper with the original record with which the genealogical table of which the plaintiffs produced a copy may be connected, or the book out of which the said copy might have been furnished.”

On the 7th April the Collector sent an answer by the Record-keeper, “ intimating that with reference to the letter received from this Court on the 31st ultimo, the Record-keeper was ordered to appear with the papers required,” and on the

same day the Record-keeper attended accordingly. He was examined and cross-examined (p. 85), and fully established the authenticity of the document, and the accuracy of the copy furnished. He must have had the original in Court, though it does not appear to have been called for. Moreover, there is documentary evidence in confirmation of the accuracy of several of the statements contained in this paper.

Their Lordships, therefore, have not the least doubt that this paper is what it purports to be, and that it established the case of the plaintiff's, unless it can be made out that the family, undivided at that time, became afterwards divided.

Now the parol evidence of the plaintiffs, if it is believed, clearly shows that there never was any division. The presumption is that a family remains undivided, and the *onus* is on the appellant to prove division. Her evidence is rather directed to show that the respondent was a member of a different family. At all events, it is quite insufficient to establish a division, when opposed to the evidence produced on the other side.

It is unnecessary to advert to the proceedings in the suit to set aside the adoption further than to say that in that suit, which was instituted as early as 1831, Kooppy Naidoo insisted on the same fact and the same title which, in concurrence with his son, he asserted in the present suit. The Court was of opinion that the adoption was good, and would prevail against the plaintiff's title, assuming it to be made out in point of fact, and therefore no decision was pronounced upon that point.

On the whole we may state that, if the question on the effect of the evidence in this case had come before us now for the first time, and not by appeal, we should have arrived at the same conclusion with the Courts below, though in that case it would have been necessary to go more in detail into the particulars of the evidence on both sides than it is requisite or proper to do when we have merely to state our concurrence in the judgment already pronounced.

There remains the question whether the plaintiff's suit is barred by the Regulation for the limitation of actions.

That Regulation (Regulation II of 1802, Section 18, paragraph 4,) provides that a suit "shall not be entertained which is commenced more than twelve years after the right accrued:" but this is subject to exceptions, one of which is, if the complainant can show by clear and positive proof that he directly preferred his claim within that period for the matter in dispute to a Court of competent jurisdiction or person having authority, whether local or otherwise, for the time being, to hear such complaint, and to try the demand, and shall assign satisfactory reasons to the Court why he did not proceed in the suit, or shall prove that either from minority, or other good and sufficient cause, he was precluded from obtaining redress.

Here the Sudder Court (for the objection does not seem to have been taken in the Zillah) has held that the suit was actually commenced in 1848; and if so, the plaintiff's title not having accrued till September 1837, the time could not expire till the 16th September 1849, and, of course, the suit would have been commenced in sufficient time not to fall within the Regulation.

With respect to this the facts stand thus:—

In 1847 the respondent's father presented his petition to the Civil Court for liberty to sue *in forma pauperis* for the recovery of this estate.

The Court was of opinion that, under Regulation 4 of 1831, he could not be permitted to sue without first obtaining the authority of Government.

In May 1848 he obtained the requisite authority, and on the 5th October 1848, he and his son, the present respondent, presented a petition for leave to sue *in forma pauperis*, and at the same time presented their plaint in this suit.

The rules of the Court require that, for the purpose of obtaining such order, the plaintiff must make an affidavit of his circumstances, add a list of all his property, and produce a certificate of a yakeel that he has a good cause of suit.

All the necessary documents accompanied the petition, and on the 13th of November 1848 the following order was made by the Court :—

“ 1848, 13th November. On a perusal of the pauper plaint and its accompaniments put in by Kooppy Naidoo and another, petitioners in Miscellaneous Petition, 631, and on taking from them the prescribed affidavit, the said bill of plaint, &c., were ordered to be filed.”

At this time, therefore, an order was made that the plaint to which an answer has since been put in, and upon which all the proceedings subsequently have taken place, should be received by the Court, and put upon record. There seems strong ground for contending that this was the commencement of the suit ; and the Court below, which must be the best judge of its own forms and practice, has held that it was so.

The practice is stated by Mr. Macpherson, at p. 85 of his valuable treatise, in these terms :—

“ The period of limitation ends on the day when the plaint is duly lodged by the complainant in a Court of competent jurisdiction, not on the day when the suit is placed by the Sudder Court upon the file of the Court which they deem most proper to try it, nor upon the day when the plaint is numbered and sent for decision ; for if there be any delay in that process, it is the delay of the Court, and not of the plaintiff.”

But if the preferring of the plaint with the order of the Court of the 13th November 1848, be not the commencement of the suit, these facts clearly bring the case within the exceptions founded in the Regulation.

There seems reason to suppose that the proceedings adopted by the Court on the 13th November 1848, were irregular, and that on that day it ought, according to the Regulation 7 of 1818, to have ordered immediate service of the petition and of the plaint on the appellant, and to have fixed a day for her to show cause, if she could, why the plaintiffs should not be allowed to sue *in formâ pauperis*.

If this course had been adopted on the 13th of November 1848, the order, which was actually made on the 1st of March 1850, which the appellant contends must be treated as the commencement of the suit, might, and probably would, have been made long within the prescribed period.

The order for service of the petition and plaint on the appellant, and requiring her to show cause, if she could, why the plaintiff should not be allowed to sue *in formâ pauperis*, was not actually made till July 1849. Service was made in August, and no cause was shown. The case, therefore, stood in this position on the 16th of September 1849, when the twelve years expired : the plaintiffs had preferred this claim within the prescribed period to a Court of competent jurisdiction, and had been prevented from commencing their suit in proper time (if, in point of fact, it was not commenced in proper time) by no neglect on their part, but by the irregular proceedings of the Court to which their claim was preferred.

It would be contrary to all reason and justice to hold that, under such circumstances, plaintiff's suit could be barred by the Regulation.

We must humbly advise Her Majesty to affirm, with costs, the decree complained of.

The 21st December 1861.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel,
and Sir J. W. Colville.

**Instruments (apparently altered and suspicious)—Presumption of false evidence
(Corroborative proof to rebut).**

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Mussamut Khoob Koonwur and others,

versus

Baboo Moodnarain Singh and others.

In an ordinary case the person who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence; and such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document.

THE facts upon which this appeal arises may be thus stated. In the year 1795 Maharajah Mitterjeet Singh Bahadoor, who appears to have been a person of considerable position in the Province of Behar, granted a Mokurrury Istemraree lease of the property which is the subject of this suit. That the grant was by a Sunnud in the Persain language; and that the instrument produced in the cause, being the original of the Exhibit No. 145 in the Appendix, is that Sunnud, and bears the genuine seal of Rajah Mitterjeet Singh, are undisputed facts. It is also admitted that the only grantee described by name was Lalla Hoonooman Dutt, the eldest son of Roy Prithee Singh, who, at the date of the grant, and for many years afterwards, up to the time of his death, was the Dewan of the granter. But the substantial question in the cause is, whether the grant was expressed to be to Hoonooman Dutt solely and simply, or to him "together with his uterine brothers from generation to generation;" in other words, whether the Persian words which now appear on the face of the Sunnud, and import the addition in question, have, as the respondents contend, been fraudulently substituted for other words, or, as the appellants insist, have always formed part of the document.

On the former hypothesis the tenure would, as the law has been settled by a course of decisions, commencing at latest in the year 1817, have determined with the life of Hoonooman Dutt. The addition of words importing "from generation to generation" would make the grant one of a perpetual lease to Hoonooman Dutt and his heirs. The further addition of the other words in question would, of course, make it one to him and his brothers jointly, and to their respective heirs. Hoonooman Dutt had two brothers, Gunness Dutt and Mahadeo Dutt; and some time in 1806 or 1807 a partition of the property comprised in the Sunnud was made between the three, by or with the sanction of their father Roy Prithee Sing. He died in 1839. His son, Hoonooman Dutt, certainly pre-deceased him; and though the precise date of his death is not clearly proved, there seems no reason to doubt that it took place, as stated by the appellants, in or about the year 1819. In 1839 Rajah Mitterjeet Singh granted to his son Moodnarain Singh a Teeka lease of his interest in certain Mouzalis, including those in question in this suit; and the latter were then treated as being still the subject of a subsisting Mokurrury tenure. In 1840 the Rajah died, leaving two sons, Hetnarain Singh and Moodnarain Singh. They made a partition of his estate, and the property in question fell to the share of Moodnarain Singh. On that occasion, it was again treated as held by a subsisting Mokurrury tenure, a circumstance which must have been considered in estimating the share to be allotted to each brother.

In 1841 Moodnarain Singh instituted three separate suits, conformably to the devolution of the property under the appellants' version of the original lease, for the recovery of arrears of Mokurrury rent alleged to be due in respect of certain Mouzahs parts of the property comprised in the Sunnud, and claiming to have the Mokurrury tenure in those Mouzahs respectively cancelled, on the ground of the arrears. These proceedings, therefore, assumed the existence of the Mokurrury tenure in the lands in question in 1841; and also that they were thus held in severalty by the descendants of Roy Prithee Singh, recognizing to that extent the partition of 1807. In one of these suits, and on the 9th February 1841, the original Sunnud was produced by the representatives of Hoonooman Dutt. On the following morning, if not on that night, it was enclosed in an envelope sealed with a seal of the Court. It was certainly from the time of its production up to the 22nd of March in the custody of the Court. On the last named day, the envelope was opened in Court in the presence of the Vakeels of both parties. The appearances which cast suspicion on the Sunnud were then for the first time discovered. On the 30th March 1842, the Sudder Ameen, before whom the case was pending, passed a decree in favor of the plaintiff for a small sum of arrears, but dismissed his suit so far as it sought for the cancellation of the tenure. On the same day he proceeded to hold an enquiry into the supposed tampering with the Sunnud whilst in the custody of the Court. His proceeding is set forth at page 43 of the Appendix, and resulted in the dismissal of the Record-keeper.

There were various other proceedings in these suits of 1841 by way of appeal to the Sudder Adawlut, and of remand to the Court below, and in the course of the litigation Moodnarain Singh appears to have raised, by petition of amendment, some new issues founded on the appearance of the Sunnud. The three suits, however, seem to have been finally disposed of by the decree of the Sudder Ameen set forth at p. 55 of the Appendix, and dated the 17th of June 1846. The effect of the decision was that the plaintiff was entitled to some arrears of Mokurrury rent, though considerably less than the amount claimed by him, and that he had shown no ground in those suits for the cancellation of the tenure.

From 1846 to 1851 Moodnarain Singh took no step; in June of the latter year he commenced the present suit, which embraces the representatives of all the three sons of Roy Prithee Singh, and is for the recovery of the whole property comprised in the Sunnud, with mesne profits since 1842, and for the cancellation of the Sunnud as spurious.

His case, so far as it is necessary to state it, is that the Sunnud as granted by his father was a grant of a Mokurrury Istemraree lease to Hoonooman Dutt alone, and therefore that the tenure legally terminated on Hoonooman's death; that the document has been fraudulently altered by those who claim under it, the Persian words importing a grant in favor of his brothers jointly with Hoonooman, and of the heirs of all in perpetuity, having been written in substitution of words descriptive of Hoonooman or of other words *erased*, and words in the singular number having throughout been converted into words plural, wherever the alteration was necessary to make the instrument consistent. He tries to explain the continued enjoyment to the lands, as under a Mokurrury tenure, after Hoonooman's death; and other circumstances which are apparently inconsistent with his theory of the original grant by the alleged influence of Roy Prithee Singh over the Maharah; and malversations in office by him and his grandson and successor in the Dewanship.

The case of the defendants is also that the Sunnud as it now exists has been tampered with, but they contend that this tampering took place whilst the document was in the custody of the Sudder Ameen's Court in 1842, and was the act of the plaintiffs' agents in collusion with the Record-keeper; that it consisted only in disfiguring certain material passages of the instrument without altering its tenor, in order to cast suspicion upon it, and to give colour to the case now made against it.

They also insisted that the present suit was barred by lapse of time under the Regulations of limitation.

It does not very clearly appear whether there has been any adjudication on this last plea. The Sudder Adawlut treated it as decided by the Sudder Ameen against the defendants, who had not appealed against his decision. But in the proceedings before this Committee there is no trace of any order of the Sudder Ameen on this plea against which the defendants could have appealed. His final decree of the 5th of August 1854 is in their favor.

Proceeding much upon the finding of his predecessor on the enquiry of the 30th of March 1842, into the conduct of the Record-keeper, he adopts the defendants' theory of the tampering, and thereupon dismisses the plaintiff's suit, declining to consider any of the other issues in the cause. He relied also on a copy of the lease bearing the Cazee's seal, which was given in evidence by the appellants, and is consistent with their case.

On appeal this decision was reversed by the Sudder Adawlut, which held that there had been a fraudulent alteration of the terms of the Sunnud, and decreed in favor of the plaintiff. On a second hearing of the case upon a petition for review of judgment, the Court adhered to its former decision, and rejected some fresh evidence that was tendered on the part of the appellants. The propriety of that rejection is not now questioned, but against the substance of the decree of the Sudder Adawlut the present appeal is preferred.

The decision of the Sudder Court rests entirely on the evidence which, in the opinion of the Judges, the inspection of the document, and the consideration of its contents, afforded of the falsity of the explanation of its suspicious appearance given by the appellants. Their printed judgment affords no ground for concluding that the corroborative proofs in support of the appellants' case had been duly presented to the Court, and overruled by them. Their Lordships, however, think this case cannot be properly decided without weighing the whole evidence on either side, and applying the presumptions from conduct thence fairly arising to the consideration of the opposite statements or theories with respect to the alteration of the instrument that have been put forth by the respective litigants. It may be conceded, that in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document.

But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document. Moreover, the peculiarity of the present case is that one of the issues to be determined is what was the condition of the document when it was first produced by those who claim under it. The appellants may fairly contend that the rule above stated is not applicable to them, until this question has been decided against them.

In dealing with the whole evidence, their Lordships will first consider that derived from the actual inspection of the document.

After close and careful examination, they are unable to concur in the conclusion of the Judges of the Sudder Adawlut that such inspection alone affords decisive proof of positive alteration by erasure. It would, in the opinion of their Lordships, be a most difficult, if not impracticable, task to efface by erasure, on paper such as that on which the Sunnud is written, words covering the space which a full line would occupy, without plainer signs of that mode of tampering, than any which this document presents. Their Lordships would expect to find on paper of this quality so dealt with, more breaking of the surface, more running of ink into blots, and a

more decided attenuation of the substance of the paper, discernible from a view of its reverse side when held to the light. They are also struck by the apparently insurmountable difficulty of so completely erasing so many words that no trace of original words of letters should be discernible with the aid of a strongly magnifying glass. The nature of the particular paper and ink seems to render so perfect an erasure so improbable that success in the attempt is not readily to be conjectured. Yet the fact of alteration by erasure is essential to the respondent's case.

Again, the addition of a plural termination to the pronoun "khud," an addition totally unnecessary on either theory of the original import of the instrument, is capable of being attributed to either side. If a falsifier of this instrument had grammatical skill enough to see the propriety of converting the singular nouns and verbs into the plural, it is reasonable to suppose that he would know, as their Lordships believe to be the case, that the pronoun "khud" was applicable to either number. To add a plural inflection to it would be to impose upon himself in that place an additional difficulty. The existence of a single noun in the singular where the strict sense required it to be in the plural, would, in a case unattended with suspicion, naturally be ascribed to oversight or ignorance, or to the use of a singular noun in a collective sense. The word "mukurrereedar" remains in this instrument in the singular where the plural termination "an" should have been added. This, it was contended, proved that the document, as it originally existed, had contained only the name of a single person as "mukurrereedar." That argument assumes that the falsifiers had overlooked in a short instrument an important word, and whilst altering the other words had by oversight neglected to convert that word into the plural. Such an oversight certainly may have occurred; but it is at least as probable a conjecture that the word stood originally in the singular, and was either advisedly used in a collective sense, or was inserted by misadventure in the singular instead of the plural number. The words in the singular, though ungrammatical, would not have been inconsistent with the operation of the instrument for which the appellants contend; their existence now in the plural cannot be relied on as in itself alone decisive evidence to turn the scale in a doubtful case against the appellants, the respondent's theory of erasure presenting, on the inspection, difficulties no less grave. The case on the argument founded on mere inspection cannot be viewed as other than a doubtful one.

The appellants meet the arguments against them with those which the appearance of the letters as blurred over and painted, the improbability of so great an erasure leaving so faint a trace, and the presence of the trace of the letter "mim" above the line, afford in confirmation of their theory of the tampering. The appearance of the paper in that part is certainly favorable to the supposition that that letter there existed, and its existence there is not reconcileable with the theory that words of mere description occupied originally the place where the disputed words are now found. On the whole, then, the inspection appears to their Lordships to furnish no certain or satisfactory grounds for deciding the case.

The next material enquiry is, what evidence is there as to the state of the instrument when first produced? This, so far as it goes, is in favor of the appellants. If the document was fraudulently altered by them, it must presumably have been so altered before it was produced in Court in 1842. It is not conceivable that they would produce an instrument destructive of their own title, which in the ordinary course would be examined on its first production, on the chance of being able fraudulently to alter its tenor whilst it was in the custody of the Court. Again, if the alteration was made before its production in 1842, the document must then have presented appearances even more suspicious than those which it now presents; since the lapse of eighteen years, and frequent manipulations in Court, must have tended to soften rather than to aggravate the marks of tampering. Those appearances could hardly have escaped the attention of one conversant with the Persian language who then examined the instrument

The Sudder Ameen, however, (a Mussulman by his name, and, therefore, presumably the more conversant with Persian), has in a solemn proceeding declared that he did carefully peruse the paper when it was produced; that it did not present the appearances which it afterwards presented; and that, if these had then existed, he must have observed and would have recorded their existence. He added that his attention to this part of his duty was well known. The Solicitor-General sought to avoid the effect of this statement by suggesting that the Sudder Ameen, conscious of having neglected his duty, sought to avoid responsibility by stoutly asserting its performance, and throwing blame upon an innocent subordinate, his Record-keeper. It is to be remarked, however, that his argument assumes the point in dispute, and it is further to be observed that the Judge followed up his declaration by an important act—the dismissal of the officer; and that there is no trace of any appeal from that act to any superior authority. The argument then assumes a violation of duty, of which there is no proof; and their Lordships cannot treat the declaration of this Native Judge, so solemnly and publicly made, as undeserving of credit.

It is next to be considered whether the respondents have satisfactorily accounted for the non-production of evidence which would naturally be in their power, and would conclusively show what were the terms of the original grant. The evidence for the respondents shows that there was, as in the ordinary course of business there would be, a kubooleut, or counterpart of the Mokurrury lease executed by the grantee to the grantor. His witnesses state that, in 1839, when Moodnarain Singh took the Teeka lease from his father, enquiry was made about this kubooleut, and that Nujeeblall, the grandson of Prithee Singh, who then acted as Dewan, stated that it was lost. The imputation on Nujeeblall seems to be that he or his grandfather abstracted this and other papers. The explanation, however, cannot be accepted as satisfactory. It is said that at the time it did not satisfy either the Maharajah or his son; and it is not easy to see why the latter, who seems even then to have been sufficiently alive to his own interests, did not take other steps either to enforce the production of the paper, or to ascertain by other means what was the purport of the original grant. The statement of Nujeeblall was calculated to excite rather than to allay suspicion.

It is, moreover, difficult to conceive that, independently of the kubooleut and of the copy of the missing register-book, there has not been in the family of Rajah Mitterjeet Singh clear knowledge of the terms of the original and admitted grant of the tenure in question, at least during a considerable part of the long period of enjoyment under it. It is no doubt suggested that the Maharajah was, in the latter part of his life at least, incapable of attention to business, and much under the influence of his Dewan. But there is no proof, and hardly a suggestion, of such incapacity in 1796, or for many years afterwards.

It is consistent with the habits of men of his rank to attend to and have a knowledge of their affairs, and to hold a sort of domestic forum for the transaction of business in their cutcherries. The grant of a Mokurrury Istemrree lease to the son or sons of the Dewan, and probably in recognition of his services, was an act likely to take place with some pomp and publicity. The terms of the grant would be notorious to many; they are not likely to have soon slipped from the memory either of the Rajah or of those of his dependants to whom they were known. Yet when we come to test the truth of the conflicting statements as to those terms by the presumptions arising from the conduct and acts of both families, what do we find? Their Lordships would not lay much stress on the mere fact that some of the family of Roy Prithee Singh continued in the enjoyment of the tenure after the death of Hoonooman Dutt. This, though *prima facie* inconsistent with the respondents' case, might be referred to the favor shown by the Maharajah to the family of the Dewan. But in 1807 when the grant was still comparatively recent, we have the partition between the sons of Roy Prithee Singh. That was a transaction

perfectly consistent with the Sunnud as it now stands, but utterly inconsistent with the hypothesis that the grant was to Hoonooman alone, and for life only. It was a transaction which can hardly have escaped the knowledge of the Rajah, or of those who would soon have made it known to him. If it were known to him, he could not have treated it as other than an impudent usurpation, and an alteration of the terms of his grant to his prejudice effected by his Dewan, unless he was conscious that it was in fact consistent with the true import of the grant, and authorized by it.

Again, this partition was clearly known to Moodnarian Singh when he commenced the suits of 1841, if not when he took the Teeka lease in 1839. The very form of his proceedings recognized this partition, and admitted the subsisting rights of Mokurreedars, though long after the death of Hoonooman Singh, and this at a time when he was hostile to them. This act of his is conceivable if the terms of the grant were known to be what the appellants say they were; inconceivable, if they were known to be what the respondent says they were; and highly improbable if they were then doubtful.

It is also obvious that when the partition took place between Moodnarian Singh and his brother, the traditions and belief of the late Rajah's family must have been in favour of the existence of a valid Mokurrury tenure in these lands; and the fact that they were held in severalty by the divided branches of Roy Prithee Singh's family must have been notorious.

Here again is a solemn act of the grantor's family which is consistent with the appellants' case, and inconsistent with that of the respondents. The evidence of the respondents' witnesses as to the kubooleut is also inconsistent with a statement in his pleadings concerning them, which was remarked upon by Mr. Forsyth in his reply.

Their Lordships think that by the presumptions thus arising from the acts and conduct of the parties during a long series of years, this case must be decided. They do not say that it is free from difficulty, or that either side has succeeded in explaining satisfactorily the state of the Persian Sunnud. But against whatever inference to the prejudice of the appellants may be drawn from that circumstance (and it is at least doubtful whether any such can fairly be drawn), may be set the presumption arising from the non-production of the kubooleut by the opposite party. The actors in the original transaction are all long since dead, and the respondent is seeking to recover the property from those who have been for many years in the enjoyment of it. In any view of the case, he has been guilty of great *laches* in the assertion of his alleged rights. The difficulties (if any) which arise from the loss of evidence, and the other consequence of lapse of time, ought, in justice, to fall on him.

It is essential to his case to establish that the original grant was to Hoonooman Dutt alone, and for life only. The weight of the evidence, independently of the disputed Sunnud, seems to their Lordships to be against this allegation and in favour of the title insisted upon by the appellants; that preponderance of proof is also necessarily in favour of the appellant's theory of the alteration of the document.

The copy of the lease, verified by the Cazee's seal, cannot be treated as any corroboration of the appellants' case, as there is a total absence of evidence concerning the time, mode, and cause of its execution and presentation to the Cazee.

This being their Lordships' view, it is unnecessary to consider whether the plea, that the suit was barred by lapse of time and the Regulations of limitation, is still open to the appellants, or could have been successfully maintained by him.

Upon the merits of the case, their Lordships propose humbly to recommend to Her Majesty that the appeal be allowed, that the decision of the Sudder Adawlut be reversed, and that of the Zillah Court affirmed; and that the respondents do pay the costs of the appeal to the Sudder Adawlut, and of this appeal.

The 21st December 1861.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, and Sir L. Peel.

Factors' Act—Protection of bona fide pledges of securities by agents.

On appeal from the Supreme Court at Fort William in Bengal.

Gobind Chunder Sein,

versus

The Administrator-General of Bengal for the time being.

By the Factors' Act (5 and 6 Vic. c. 39 extended to India by Act XX of 1844) pledges of securities made *bona fide* by agents entrusted with them are protected, but such protection is limited to advances made *bona fide*, and without notice that the agent who pledges has no authority to pledge, or in acting *mala fide* in the transaction against his principal.

In deciding the issue of want of good faith, and of notice to the lender that the agent has not authority, or is acting *mala fide*, the proper question to be considered is whether the circumstances under which the pledge was made were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, if not also that he was acting *mala fide* in respect thereof against his principals.

THIS was an action of trover, brought in the Supreme Court at Fort William in Bengal, to recover the value of certain bales of twist. The pleas were, Not Guilty, and Not Possessed. The original defendant was one Ryan, master of the ship *Aurora*—he is now deceased—and represented by the nominal defendant; but as the action was defended on the indemnity of Messrs. Gouger, Jenkins, and Co., merchants at Calcutta, it will be convenient to treat them as the respondents. The case was tried before the then Chief Justice Sir James W. Colville, and Mr. Justice Jackson; they found a verdict for the defendants, and subsequently discharged a rule for a new trial, which had been applied for, on the grounds of misdirection, and of the verdict being against the evidence. Judgment was entered up, and against this verdict and judgment the present appeal has been brought.

The undisputed facts of the case are substantially as follows:—The goods in question were shipped in London by Alfred Gouger on behalf of himself and a Mr. Stewart, and consigned to Gouger, Jenkins, and Co.; the bill of lading was forwarded to them.

At the time of the arrival neither Gouger nor Jenkins was at Calcutta, and the business of their firm was being carried on by James Tobin Cockshott, under a power of attorney. The firm had been in the habit of employing a banian by the name of Denonath Sein; to this man Cockshott gave the bill of lading endorsed in blank, for the purpose of procuring a delivery order, and the delivery of the goods to the firm; but it was also part of the ordinary employment of Denonath, which applied to the present transaction, to procure a purchaser, and when he had so done, he was to report the name of the buyer and the terms to his principals for their assent to the contract. If they agreed, their initials were written upon it, which being done, the banian had authority to deliver the goods to the purchaser and receive the price. Between the banian and his principals there was an account current, which was balanced at the end of the month; he was then debited for the contract price of the goods sold and credited for the sums which he paid to the house; he received his "dustooree" or commission, from the purchaser.

In the present case he contracted for the sale of the goods to one Doorgapersaud, and by the terms of the contract the goods were to be cleared away and settled for "within forty-one days after landing days from the date of the contract," 19th February, 1848.

To this contract Cockshott assented, and affixed his initials, and henceforward Denonath Sein became entrusted, as between himself and his employers, with the bill of lading for the purpose of delivering the goods on the terms of the contract; they were by these terms made deliverable on payment in cash.

In this state of things, Denonath and Doorgapersaud went to the applicant, a banker and money-lender. According to the evidence they represented to him that the latter had made a contract for the twist, and Denonath produced the bill of lading; it was stated that Doorgapersaud could not pay the whole amount, between 23,000 and 24,000 rupees, in one sum, and that they (the two) wanted an advance. It was finally arranged that the appellant should advance to Denonath 20,000 rupees, less 400 deducted for discount. Denonath gave him his own promissory note for the amount, and signed a letter prepared by him, which stated the fact of the delivery to him of the bill of lading, and gave him authority to sell for his own benefit the goods in case of non-payment within one month and a-half, refunding any excess that might remain, after deducting the principal and interest, and other charges, and making Denonath liable to him for any deficiency on the sale. Upon the authority of this instrument the delivery of the goods was demanded by the appellant and refused upon the indemnity of the respondents; and the present action brought.

It is stated that the 23,000 rupees were paid to Denonath, and of these he paid 10,000 to the Oriental Bank on account of the respondents, in obedience to a previous order, and had credit from them for the amount in the account current between them in which he was at the time, and still remains, largely indebted to them in respect of previous sales and other transactions on their behalf.

Upon the trial some evidence was given as to the nature of Denonath's employment, and the character and extent of his agency. The Court found that he received the bill of lading for the special purpose of getting delivery of the goods and that before the delivery order was given, but after the receipt of the bill of lading, he informed his employers of the sale, and that they approved of the purchaser; that he was not strictly a factor, but more than a mere servant—an agent to find purchasers, and, under some circumstances, to guarantee the payment; that the bill of lading was allowed by Cockshott to remain in his hands to obtain delivery of the goods, and that he had full authority to give delivery to purchasers on payment of the price; that he was, in the transaction in question, an agent within the meaning of the last Factors' Act; that it must be taken on the evidence that the contract of sale with Doorgapersaud was not fraudulent; and that the only question remaining was, whether the pledge to the appellant was protected by that Act—as to which the Court thought that the facts raised the inference that there was *mala fides* on the part of Denonath in dealing as he had done with the goods, and that the appellant had notice that the pledge was without authority from the respondents, and not *bona fide*. They therefore held that the transaction did not come within the protection of the Factors' Act, and that the verdict must be for the respondents.

On this finding the rule was obtained which we have stated above, and, after argument, discharged upon the grounds stated in a very able and learned judgment delivered by Sir James W. Colvile, the correctness of which their Lordships are now to consider. In doing so it may be convenient, in the first place, to dispose of the question of a misdirection; and this they will do very shortly; for it seems to them that there is not the slightest ground for this part of the rule.

The question which the learned Judges made the cardinal one in the case, was, whether the circumstances, were such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonath had not authority to make the pledge, if not also that he was acting *mala fide* in respect thereof against his principals.

This is precisely the way in which the question was put to the Jury in a case under the first Factors' Act, 6 Geo. IV., cap. 94, in *Evans vs. Truman* (1 Moo. and Rob. 10); and this was unquestioned at the time, though the case came before the Court on another point; this mode of leaving to the Jury the question of notice was approved of by Lord St. Leonards, in *Navulshaw vs. Brownrigg* (2 De Gex. M. and G. 452), as a proper mode under the last Factors' Act, 5 and 6 Vict., cap. 39; on

which in substance the present case depends. And their Lordships entirely concur in the principle established by these authorities. The question so put gives full effect, on the one hand, to the large words of the first Section of the Act, and effectuates the object of protecting pledges and exchanges of securities made *bond fide* by agents entrusted with them, in consideration of advances made in respect thereof; and, on the other, it gives proper, and no more than proper, effect to the third Section, which limits such protection to loans, advances, and exchanges made *bond fide*, and without notice, either that the agent making them has no authority to make the same, or is acting *malá fide* in respect thereof against the owners of the goods represented by the document pledged. It makes the decision depend not at all on mere suspicion, on the want of inquiry or of reasonable caution in the party advancing on the pledge, nor yet on the mere want of good faith in the agent, of which the party advancing is ignorant: all these, and such matters as these, which are in themselves inconclusive, and tend to embarrass the dealing with negotiable instruments, may be evidence; but the Tribunal deciding the issue, whether the Jury, or, as here, the Judges acting as a Jury, must, in order to bring the case within the third, and take it out of the first Section, categorically find the facts of want of good faith, and of notice to the lender of want of authority in the agent, or that he is acting *malá fide* in the transaction against his principal. The Statute is silent as to the grounds on which the conclusion is to be arrived at; that is left to the ordinary principles of evidence. But where the fact is so found, it would be as much against mere honesty as against the interests of commerce, properly considered, to afford any protection to the transaction. This objection, therefore, to the judgment entirely fails.

It remains to consider whether the verdict was against the evidence, and in doing so it will be necessary to introduce some additional facts, which did not find their place in the previous summary.

Upon a careful consideration of all the circumstances, and after attention given to the arguments of the appellant's Counsel, they are of opinion that the Judges below have drawn the only right conclusion, that to which their Lordships would have been themselves led, and that the Court have shown great caution in not pressing its inferences as far, perhaps, against the appellant as in strict justice might have been warranted.

The Judges say that where there was a conflict of testimony between the appellant and Denonath on the one hand, and Mr. Jenkins and Mr. Cockshott on the other, they had been disposed to credit the latter rather than the former. Now it being assumed that Denonath was an agent entrusted with the document of title to the goods, so as to bring the case within the first Section of the Statute, the advance which the appellant made will still not be protected unless made *bond fide*, and without notice that the agent making the contract had not authority to make the same, or was acting *malá fide* against the owner. The appellant must in the first place have acted *bond fide* in making the advance; and, secondly, he must have been without notice of want of authority in the agent; or, thirdly, of *malá fides* in him against the owner. It appears to their Lordships that the evidence establishes all these three propositions.

As to the first, they assume that the appellant really advanced the large sum of 19,600 rupees, but this alone will not establish his *bond fides*; he did so on advantageous terms to himself (whose business it was to lend money), in respect of the rate of discount and interest, and of perfect security, if the transaction should remain unimpeached. But beyond this it was essential to his *bond fides*; that he should believe the representations of Denonath and Doorgapersaud; and if he believed these, he must have believed also that the goods were actually sold to the latter, and were to be cleared and settled for in forty-one days: yet the terms of his advance were that he might, when he pleased, remove the goods at the cost of Denonath to his own godowns, and at the end of a month and fifteen days sell

them, if the advance were not then repaid with all charges. Now he says he did not come to this agreement without cautiously enquiring as to the power under which Cockshott, the apparent principal for the time being of Denonath, was said to be acting, and that he went to Cockshott for the purpose of seeing it, and did so. If he had been acting *bond fide*, towards Cockshott, it seems to us that exercising this somewhat superabundant caution as to the power, it is incredible that when in Cockshott's presence, he should have made no enquiry or communication, respecting this particular transaction; yet their Lordships think it perfectly clear upon the evidence that he did not. When it is considered how conclusive that communication, one way or the other, would have been, they cannot doubt that it would have been made by any one about to enter into such a transaction *bond fide*, nor that it would have been stated, if it have been made; but neither does the appellant affirm it in his evidence, nor was Cockshott cross-examined to it; and as having been examined on interrogatories before the trial, and not being at the trial, his silence on the subject is entirely consistent with the same conclusion. If the transaction had been *bond fide*, on the part of the appellant, the communication, as we have said, would naturally have been made, but if it were *malâ fide*, it certainly would not; because it must have been known that it would put an end to the transaction at once, and that Denonath would not have been allowed to pledge goods which were already under contract of sale. This circumstance, however, strong as it is, does not stand alone. Denonath comes to the appellant, not armed with all the documents which are stated to be usually in the hands of an agent authorised to pledge, and without excuse for their absence; and he comes, too, as an agent who has already confessedly exhausted his authority in respect of the goods, by the contract which he has made for the sale of them, and who seeks to pledge them on terms inconsistent with the terms of that contract. This presence and implied assent of the purchaser, so far from lessening these difficulties was of a nature only to increase the suspicions attaching to the transaction.

The evidence enables their Lordships to deal with the two remaining questions at the same time. Had the appellant notice that Denonath was without authority to make the contract of pledge, or that he was acting *malâ fide* against his principal? They think that the evidence warrants an answer in the affirmative as to both. First, it is clear that in fact he had no authority express as to this transaction, or to be implied from any previous course of dealing; and if in truth he had been allowed to pledge more frequently, or with greater similarity of circumstances to those of the transaction in question than the evidence here discloses, there is nothing to show that the appellant was aware of this or acted on the credit of it. Secondly, it is clear that in fact Denonath was acting *malâ fide* towards his principals; the account current shows that he was largely indebted to them on the balance of prior transactions; he was bound in order to maintain his post and credit with them, to make a payment for them at that time, and he sought to do this fraudulently by raising money on their own goods, which he would have to account for at a later period, and so forestalling the proceeds of them.

But of course these facts though necessary as a basis, are not in themselves sufficient, without notice of them to the appellant. Whether he had such notice must be judged as any other question of fact. To adopt the question on which the Judges made their decision turn. Were the circumstances such as that a reasonable man, and a man of business, applying his understanding to them, would certainly know that Denonath had no authority to make the pledge, or that he was acting *malâ fide* in respect thereof against his principals? In answering this it must be remembered again that the Statute, though it insists on a conclusion, prescribed nothing as to the nature of the evidence on which it is to be founded, or the manner in which the enquiry is to be conducted. The question must be dealt with as any other question of fact, by a due consideration of all the circumstances. Then it may be taken here as if Denonath had said "I am the Banian of

the respondents; I hold in my hand the bill of lading of goods consigned to them, but not delivered. I have contracted to sell them to Doorgapersaud, who stands now beside me. My principals have sanctioned the sale, and he is to pay for them and clear them away in forty-one days. Now I desire you to advance me money on these goods; I will give you my own promissory note for the amount, and I will deposit the bill of lading endorsed with you; you may take the goods at my expense at once to your own godowns, and if I do not repay you at a period exceeding the date at which he is to clear and pay for them, you may sell them and pay yourself with interest, and all charges; and meantime you may deduct a large discount from the sum advanced;” and this offer is accepted after a visit to Cockshott to see his power of attorney, and not a word said upon it to him at the interview.

The appellant was a man of business; he had been himself a Banian; he either knew much of Denonath and his dealings, or little—if much, it is clear upon the evidence, and very material, that he had never known him, as agent of the respondents, deal with their goods in a similar way under similar circumstances—if little, the more caution was necessary. He did apply his mind to the matter, for he required personal satisfaction as to Cockshott’s power. What then must reasonable men in turn applying their minds to these same circumstances believe to have been the clear conviction in the appellant’s mind as to Denonath’s authority or honesty. Their Lordships think that there is but one answer to this, that he must have felt perfectly certain that Denonath was acting without authority; if so, it is unnecessary to say whether with *malâ fides*, though upon this they do not themselves entertain any doubt.

It remains only to notice a circumstance not very strongly relied on by the appellant’s Counsel, nor, perhaps, strictly relevant to the issues in the cause, but yet which it will be better to dispose of. It appears that in the account current between the respondents and Denonath for February, the month in which this transaction took place, the latter is credited with the sum of 10,000 rupees paid to the Oriental Bank for the former. These 10,000 rupees have been taken, in the argument, and are so now, to have been a portion of the 19,600 rupees advanced by the appellant. It was urged that the accepting the 10,000 rupees with a knowledge how they were procured (a fact which stands not quite clear upon the evidence), was a ratification of the dealing between the appellant and Denonath. Their Lordships do not assent to this argument. The sale of the goods to Doorgapersaud not being to be completed until the month of March, would not come into the account between the respondents and Denonath until the end of that month; and in the account then to be made up if it had been regularly completed, he would have been debited with the price for which they had been sold and credited with the payment of that price to them. Meantime he being largely in their debt, and having been ordered to make a payment for them, in respect of some prior dealings for them, had raised the money by this fraudulent pledge of their goods. Though he had so done, yet he was the principal debtor for this money to the appellant on his own promissory note, and if everything had gone to its regular end, the respondents would have received nothing more from him than they were entitled to. They have now received much less. As the payment was actually made to the Oriental Bank before it appeared in the account, and in pursuance of a previous order, the respondents could neither refuse to give Denonath credit for it, nor could they be called on to repay the money to the appellant: any more than if, without the collateral security of the pledge, it had been advanced on the personal security only of Denonath. Their conduct, therefore, does not amount to a ratification of pledge.

On all grounds, therefore, their Lordships will humbly advise Her Majesty that the judgment below should be affirmed, and the appeal dismissed with costs.

The 21st December 1861.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colville.

Hindoo Law (of Inheritance) —Alienations by Widow—Pundits (opinions of)—Crown—Escheat—Estoppel—Onus probandi.

On Appeal from the Sudder Dewanny Adawlut at Madras.

The Collector of Masulipatam,

versus

Cavalry Vencatta Narainapah.

Under the Hindoo Law a widow, though she takes as heir, takes a special and qualified estate. If there be collateral heirs of her husband, she cannot, of her own will, alienate the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. The restrictions on her power of alienation are inseparable from her estate, and independent of the existence of heirs capable of taking on her death. If for want of heirs, the property, so far as it has not been lawfully disposed of by her passes to the Crown, the Crown has the same power of protecting its interest as an heir by impeaching any injurious alienation by the widow.

Where an opinion, apparently discordant from works of current and established authority is delivered by Pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned further as to authorities, usage, and generally received opinions.

The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government, in fact or in law, directly, or by implication, ratifies the excess.

The onus is on those who claim under an alienation from a Hindoo widow to show that the transaction was within her limited powers.

THIS cause has come before their Lordships on appeal for the second time. They regret to find that they are still without the means of satisfactorily determining the long litigation between the parties.

The zemindary, which is the subject of the suit, was claimed by the appellant on behalf of the Government of Madras, as an escheat to which the Crown became entitled on the death of the widow of the last male zemindar, of whom there were no heirs in remainder to the widow; and he claimed to have it free, and discharged from all incumbrances with which it had been charged by the widow during her enjoyment of it.

The respondent disputed the right of the Crown to take the particular property by escheat in any circumstances; and insisted that, even if that right existed, he had a title to the zemindary paramount to that of the Crown by virtue of a razeenamah executed in his favor by the widow in her life-time. His case as to this was, that his father had made advances to the widow for some of the purposes which, under the Hindoo Law, justify the alienation by a widow of immoveable property inherited from her husband, and had obtained a decree for the amount of the debt; that after his father's death he had taken out execution on that decree, and that to stay his execution the razeenamah had been executed. He further contended that this had been done with the sanction and under the advice of the then Collector of the District, and that the Government was estopped from disputing the transaction, if it could otherwise have done so, by the conduct of its officer.

The razeenamah was in the nature of an agreement for the payment of the judgment-debt by instalments, with stipulations that if default were made in the payment of any instalment, the whole sum should become due, and that the judgment-creditor should be put into possession of twelve out of the fourteen villages comprising the zemindary (which were to be impledged to him) and should, on her death, take possession of the two other villages, and hold the whole zemindary as his absolute estate. No instalment was paid by the widow, nor yet was possession taken under the razeenamah in her life-time. The respondent, however, alleged

that it was by reason of an order of the Sudder Court, suspending the execution of the razeenamah, in consequence of proceedings in another suit, that he failed to get possession.

It follows from this statement that the question to be determined in the cause were, whether the Crown had any title by escheat to the lands ; and, if so, whether that title had been defeated, either absolutely or to the extent of any subsisting charge, by the acts of the widow in her life-time. The latter question involved the consideration of the powers of a Hindoo female taking her husband's estate by inheritance, and whether the transaction relied upon by the respondent was an act done *bond fide* in the exercise of her powers, or a mere colorable contrivance for transferring the property to the respondent in spite of her disabilities.

In the judgment of the Sudder Adawlut, which was the subject of the first appeal, the Court has dealt with the first of these questions only. It held that the property having belonged to a Brahminical family, the Crown had no right to take it by escheat, though on the clearest failure of heirs : and therefore dismissed the suit on that ground, without adjudicating upon the other questions raised in it.

Upon the appeal, however, the whole case was, more or less, fully agreed. Their Lordships' came to the conclusion that the judgment of the Sudder Adawlut was erroneous ; that the Crown was entitled to take the property of a Brahmin, as of any other Hindoo subject, dying without heirs ; and that the question whether such property would be subject, in the hands of the Crown, to any trust in favor of Brahmins, that would be capable of enforcement, was one which could not be determined in that suit. After stating their reasons for this conclusion, their Lordships' judgment proceeded thus :—

"Their Lordships' opinion is in favor of the general right of the Crown to take by escheat the land of a Hindoo subject, though a Brahmin, dying without heirs ; and they think that the claim of the appellant to the zemindary in question (subject or not subject to trust) ought to prevail, unless it has been absolutely, or to the extent of a valid and subsisting charge, defeated by the acts of the widow in her life-time. In the latter case the Government will, of course, be entitled to the property subject to the charge. It follows that the decree of the Sudder Adawlut cannot stand. The manner in which it ought to be varied depends upon the decision of the questions which have been raised touching the acts of Lutchmedavamamah in her life-time. On none of these has the Sudder Adawlut adjudicated. On some of them, as, for instance, the effect of the Collector's act in 1841, it is peculiarly desirable to have the judgment of that Court. Again, it appears to their Lordships very doubtful whether the present record affords the materials requisite for the satisfactory decision of some of those questions. There is little, if any, legal evidence of the nature of the advances made to the widow, or of the necessity for them. It may also be material to know what was the nature, and what the effect of the proceedings by which the execution of the razeenamah was suspended. In these circumstances, their Lordships do not feel that they can safely do more than remit the appeal to the Sudder Adawlut for further hearing, with a declaration that the general right of the Government by escheat (subject or not subject to a trust) has been established."

Their Lordships also suggested to the parties the expediency of compromising the suit upon some such terms as the surrender of the zemindary to Government upon payment of what might be due to the respondent for the advances really made.

Upon the recommendation of their Lordships, an order was made by Her Majesty in Council, in July 1860, pursuant to their judgment, and remitting the cause to the Sudder Adawlut.

The case went back to Madras, and was re-heard by the Sudder Adawlut there. In the judgment pronounced on the 22nd October 1860, the Judges stated that they had ascertained that both parties, having failed to come to an agreement, wished the suit to proceed. They further stated that they had not found it necessary

towards their pronouncing upon the merits of the suit, to call for the additional evidence which their Lordships had indicated as apparently requisite. They accordingly proceeded to deal with the merits of the suit in the following way.

Admitting the right of the Crown to take by escheat property of which the last owner died without heirs, they held that where there had been an assignment by that owner though a female, the Crown could not take the place of an heir to challenge her power to make that assignment. They, therefore, decided that the suit, having been brought upon the erroneous assumption that the Crown had the power to challenge and defeat the act of the last incumbent, should be dismissed.

They next decided that, even if the Crown had the right contended for, it was estopped from asserting it by the acts of the Collector, and the sanction given by him to the razeenamah of 1841.

They, lastly, decided that, even if the Crown could now challenge the alienation in question, the plaint had not been properly framed for that purpose.

It is with the appeal against this judgment that their Lordships have now to deal.

It has been argued for the appellants that in ruling the first and third of these points, the Court below has exceeded its powers, inasmuch as it has come to conclusions inconsistent with those expressed in or implied by Her Majesty's order of July 1860. In their Lordships' opinion this objection is well-founded. The order of 1860, which, after argument here, recommended, if it did not enjoin, the Court below to take additional evidence on the question whether the acts of the widow in her life-time were valid against the Crown, must be taken to assume that the question was one fairly open to the parties upon the pleadings.

Again, the declaration that the general right of the Crown to take the property by escheat ought to prevail, unless it had been defeated by the acts of the widow in her life-time, when followed by the direction to adjudicate upon those acts, seems to imply a decision that the Crown had established its right to maintain a suit of this nature.

The first conclusion of the *Sudder Adawlut*, however, involves a question of substance—an important question of Law; and if their Lordships were satisfied that it was well-founded, they would be disposed to prevent its being met by the objection, in some degree formal, of its inconsistency with the order of Her Majesty, by taking measures to procure the variation of that order. They, therefore, proceed to consider—*first*, whether the conclusion is, in fact, correct.

The principal argument in support of it, which has been very ably put by the learned Counsel for the respondents is, that on the death of a Hindoo owner of an undivided estate without preferable heirs, the whole inheritance descends to and vests in his widow; and that, although it be true that her power of disposition over it is qualified, and only valid against the heirs next in succession when exercised for certain purposes or with their consent, yet, if there be no such heirs it becomes absolute, or, at all events, its exercise at her free-will can be questioned by nobody. Her power of disposition was likened to that of the male owner of an undivided estate in that part of India in which the general Hindoo Law obtains without qualification: he can dispose of that as he will, if he has no adult sons; but, if there be such sons, their consent is necessary to render his disposition valid. The only difference between the two cases was said to be that in the one the right of objection was confined to sons, or other direct descendants—in the other it was possessed by all collaterals capable of inheriting to the deceased husband of the widow.

It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life-estate; that great confusion arises from applying analogies derived from the English Law of real property to the Hindoo Law of inheritance; and that, when so applied, the terms by which we describe estates in land under the English Law are more likely to mislead than to direct the judgment aright. It may, however, be doubted whether the argument, on

behalf of the respondents, does not really require some such process of reasoning to support it, the Hindoo widow, it was urged, has an estate of inheritance, not a life-estate ; the original estate, it is said, devolves on her in a course of succession derived from the husband, who had in him an estate of inheritance which she takes as heir. Yet, what is this, in effect, but to apply the English Law regulating the descent of lands in fee simple from ancestor to heir ?

It is clear that, under the Hindoo Law, the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English Law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindoo Law that the extent and nature of the qualification can be determined.

It is admitted, on all hands that if there be collateral heirs of the husband, the widow cannot, of her own will, alien the property except for special purposes. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favor of alienation with consent may be due to a presumption of Law that, where that consent is given, the purpose for which the alienation is made must be proper.

Nor does it appear to their Lordships that the construction of Hindoo Law, which is now contended for, can be put upon the principle of *cessante ratione cessat et ipsa lex*. It is not merely for the protection of the material interests of her husband's relations that the fetter on the widow's power is imposed. Numberless authorities, from Menu downwards, may be cited to that, according to the principles of Hindoo Law, the proper state of every woman is one of tutelage ; that they always require protection and are never fit for independence. Sir Thomas Strange (see "Strange on Hindoo Law," Vol. I, page 242), cites the authority of Menu for the proposition that, if a woman have no other controller or protector, the King should control or protect her. Again all the authorities concur in showing that, according to the principles of Hindoo Law, the life of a widow is to be one of ascetic privation (2, "Colebrook's Digest," 451). Hence, probably it gave her a power of disposition for religious, which it denied to her for other purposes. These principles do not seem to be consistent with the doctrine that, on the failure of heirs, a widow becomes completely emancipated ; perfectly uncontrolled in the disposal of her property ; and free to squander her inherited wealth for the purposes of selfish enjoyment.

Their Lordships cannot but think that, if the consequences of the failure of heirs of the husband were such as they are now argued to be, there would be some decision on a case so likely to have happened before, or, at all events, that there would be some trace of so startling an exception to the general rule of Hindoo Law touching females taking by succession the property of males, in the ancient text-writer and commentators. The proposition, however, rests upon the argument founded on the nature of the Hindoo female's estate as an estate of inheritance ; upon a passage from a modern treatise by Mr. Strange, for which no authority is cited ; and upon the opinion of the pundits. The *first*, for the reasons already given, their Lordships consider unsatisfactory. The *second* cannot be treated as more than an opinion, though an opinion deserving of respect and attention. Upon the *last*, their Lordships can but repeat an observation made by them in a late case, to the following effect :—"Where an opinion apparently discordant from works of current and established authority, is delivered by pundits, it must not be taken on their authority to be a correct exposition of the law. They should be questioned

further as to authorities, usage, and generally received opinions. Such an enquiry might produce a conviction that the pundits on a new case delivered rather their own notions of expedient law, as law, than delivered it on the force of the opinions of any writers or authoritative expounders of the Hindoo Law."

Their Lordships are of opinion that the restrictions on a Hindoo widow's power of alienation are inseparable from her estate and that their existence does not depend on that of heirs capable of taking on her death. It follows that if, for want of heirs, the right to the property, so far as it has not been lawfully disposed of by her, passes to the Crown, the Crown must have the same power which an heir would have of protecting its interests by impeaching any unauthorized alienation by the widow.

Their Lordships, therefore, dissent from the first ground on which, by the judgment under appeal, the Sudder Adawlut has dismissed the appellant's suit.

The next consideration is, whether the Sudder Adawlut was right in holding that the Crown is estopped by the act of the former Collector, Mr. Grant, from disputing the title asserted by the respondent under the razeenamah. In their Lordship's opinion, the principles of estoppel do not support this contention. On every reasonable presumption the facts relating to the creation of the original debt were known to the respondent, or to the original plaintiff in the suit whose judgment he was enforcing. The Collector would have no necessary knowledge on the subject, nor is he proved to have had actual knowledge. His advice to the widow to the effect that unless she made an arrangement with the creditor, the estate (which, the sale being an execution sale, must be taken to mean her right, title, and interest in the estate) would be sold, is not a statement at variance with the true state of things. The razeenamah into which she entered, might, for aught that appeared, be satisfied by payment of the instalments in her life-time. Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, which the Government, in fact, or in law, directly, or by implication, ratifies the excess. The Collector in this case had certainly no authority to waive the rights to which Government might become entitled by the escheat: nor were his acts, when fairly viewed, calculated to give rise to the supposition that he had such an authority.

Their Lordships have already indicated their opinion that it is too late to assert, if it could ever have been successfully asserted, that it is not open to the appellant on these pleadings to question the validity of the widow's alienation against the Crown. The reasoning of the Sudder Adawlut on this point seems to their Lordships to involve some misconception of the effect of the decree under which the respondent claims. As regards the appellant, that decree is *res inter alias acta*. He is, therefore, in a very different position from one who, coming into Court to get rid of a decree binding upon him, has to allege and prove that it was fraudulently or collusively obtained, or is open to some other definite objection.

Again, though particular circumstances may shift the burthen of proof, the general rule certainly is, that it lies upon those who claim under an alienation from a Hindoo female to show that the transaction was within her limited powers.

Their Lordships continue to think that the evidence before them is not such as to admit of a satisfactory decision of the question whether the razeenamah does to any, and what extent, constitute a charge on the zemindary as against the Crown, and that there ought to be a further trial of that issue. Under the former order of Her Majesty, the Sudder Adawlut should have given to each party, if so disposed, an opportunity of adducing further evidence. It does not appear to have done this, but to have acted on its own impression that no further evidence was necessary. Such at least is their Lordships' understanding of the preliminary statements in the judgment under appeal.

In these circumstances their Lordships propose humbly to recommend to Her Majesty that the present appeal be allowed; that it be declared that the Crown, taking by escheat, the same right to impeach the alienation by the widow which the next heirs of the husband (if such there had been would have had, and is not estopped from asserting that right by the acts of the Collector in 1848; that the Crown is not bound by the decree, and that the widow was not entitled to alienate without the consent of the Crown, except in so far as she could have alienated without the consent of the next heirs of the husband, if such there had been, but that the respondent is, at all events, entitled to a charge upon the estate, and to be paid and satisfied thereout, the full amount of all such of the advances, if any, made by the respondent's father to the widow as were made for purposes for which, according to the Hindoo Law, she would have been entitled to alienate, the estate, as against the next heirs of her husband, if such there had been, in so far as she had not other estate of her husband to answer such purposes, and that the cause be remitted to the Sudder Adawlut to enquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the razeenamah, and, if not, to enquire what advances, if any, were made by the respondent's father to the widow, and whether all or any, and which, of such advances, and to what amount, were made for purposes for which, according to the Hindoo Law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, if such there had been, and whether the widow had, when such advances were respectively made, other estates of her husband sufficient to answer such purposes, and the parties respectively are to be at liberty to adduce further evidence touching the matters aforesaid, or any of them, as they may be advised, and the Sudder Court is to proceed in the cause according to the result of the said enquiries.

The 16th July 1862.

Present :

Lord Kingsdown, Judge of the Admiralty Court, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Criminal Appeal to Privy Council.

Petition for leave to appeal from a sentence of the Court of Nizamut Adawlut in Bengal.

Joy Kissen Mookerjee, *Petitioner.*

Prerogative Right of Appeal to the Privy Council in matters of Criminal Jurisdiction.

THIS is an application for leave to appeal from a decision of a Criminal Court in the East Indies.

It appears from the proceedings in the case that a person of the name of Joy-kissen Mookerjee has been convicted of a criminal offence, *viz.*, that of having procured the leases of certain property to be forged. The questions for the decision of their Lordships are, *first*, whether, as has been argued, there exists on behalf of the Crown a prerogative right of appeal even in matters of criminal jurisdiction; and, *secondly*, whether this is a proper case in which the authority of the Crown should be interposed for the purpose of doing justice.

Now, with reference to the existence of the prerogative of the Crown, their Lordships are desirous that no expression should fall from them which in the slightest degree would throw doubt on the existence of that prerogative, not only under the existing circumstances, but in others which might arise, with reference to other dominions of the Queen which may have been acquired by conquest. They do not think it necessary that they should, on the present occasion, enter minutely

into the considerations upon which the prerogative of the Crown is founded. They think it will suffice for the purpose of this case to assume that it does exist, and, consequently, that it is in the power of the Judicial Committee of the Privy Council, exercising that prerogative right under the Crown, so to advise Her Majesty, if they should think an appeal ought to be allowed on the present occasion.

With regard to the merits of the case itself, their Lordships certainly are inclined to come to the conclusion that justice has not been very well administered on the present occasion ; and, supposing it to have been a civil case, and not a criminal case, they would have had no hesitation whatever in recommending to Her Majesty to allow an appeal for the purpose of considering these proceedings, and of doing justice to the party complaining.

But this is a criminal case, and subject to very different consideration. Admitting, therefore, two things—admitting the existence of the prerogative of the Crown, and admitting that this, *prima facie* and presumptively, is a case of great grievance, their Lordships have now to determine whether, looking at all the circumstances attending the granting of appeals in criminal cases, it would be their duty to advise Her Majesty to grant, this appeal or to withhold it.

We must recollect, in the first place, that, by granting an appeal is meant an examination of the whole of the proceedings which have taken place. It is not simply for the investigation of any legal question which might arise ; it is for the purpose of examining the whole of the evidence, and the whole course of the proceedings upon the trial, to enable us to come to a conclusion upon the merit.

Now, it is of no small importance to bear in mind that, notwithstanding the numberless instances in which an application of this kind might have been made to the Queen in Council from all the various dominions subject to Her Majesty, from all those parts of her dominions that were acquired by conquest, and where Her Majesty has the entire sovereign power of legislating for them according as she may think fit, *i. e.*, either by Orders in Council, or, as was determined on a former occasion, by virtue of letters from the Secretary of State,—it is, I say, to be borne in mind that, in no instance whatever of any grievance, however great, at any time, has any attempt ever been made to apply to Her Majesty for leave to appeal in a criminal case.

We can easily call to memory very many instances which have occurred in the Colonies, in which it has been alleged that gross injustice has been done, and even lives sacrificed where they ought not to have been exposed to any danger ; but no precedent of an appeal of this nature has existed ; and we think it is obvious, upon the least consideration of the consequence, how it is that no such precedent has existed, and how it is that no such precedent would have been created, even if an attempt had been made to call into force the power of the Crown. It may be true that on some occasions it is not very desirable to argued simply from consequences alone ; but the consequences of granting an appeal in cases of this description are so exceedingly strong, they are entirely destructive of the administration of all criminal jurisprudence, that we cannot for a single moment doubt that they are of the greatest importance in guiding us to form a judgment.

Now, if we were to advise Her Majesty to grant an appeal on this petition, how would the case stand ? It is simply the case of an individual having been convicted of causing documents to be forged. Would not the same right apply to capital cases ? What would be done in a capital case ? Is there any distinction which can be drawn ? If the prerogative of Her Majesty gives this individual the right of appeal, could any rules or regulations be imposed whereby that right of appeal could be governed or could be restricted ? So you would go through the whole catalogue of cases ; and there is no doubt whatever that, whenever punishment was likely to ensue, there would follow an appeal to Her Majesty in Council, and consequently not only would the course of justice be maimed, but in very many instances it would be entirely prostrated.

These are the reasons which operate upon our minds in rejecting this application; not at all forgetting that injustice may have been done in this individual case, and not at all forgetting that the power of the Crown may be invoked in another shape, and that that injustice may be remedied. Their Lordships are of opinion that they cannot, under the existing circumstances, advise Her Majesty to admit this right of appeal; but they doubt not that justice will be done, because they would suggest that an application should be made to the constituted authorities, who have the power to afford a remedy, though in a different way. They doubt not that, when it is represented to those authorities that this suggestion emanates from the Judicial Committee, they will not be loth to examine into the circumstances of the case, and to do that which justice may require.

We have only one word more to say on the present occasion. Their Lordships do not think it necessary to enter at all into the question which has been discussed at the Bar this morning: it would require a very nice examination of the statutes and the criminal law of India, which could only end in the same way. Whatever might be the result of that examination, we have no hesitation in saying the course we are now about to adopt would be the course we should then recommend Her Majesty to pursue. We cannot grant this application.

The 19th July 1862.

Present :

Lord Kingsdown, Judge of the Admiralty Court, Sir Edward Ryan, Sir Lawrence Peel, and Sir J. W. Colvile.

Vendor and Purchaser—Title—Charge—Notice.

Appeal from a Decree of the Sudder Dewanry Adawlut at Madras.

Varden Seth Sam,

versus

Luckpathy Royjee Lallah.

By contract and deposit of title deeds, B. charged certain land in favour of A., as a security, in respect of the non-delivery of the title deeds of an estate bought by A. from him. After the creation of this charge the land was transferred by B. to C. The Sudder Court having decided that the contract was not operative as a hypothecation or pledge even between the parties to it, and that A. had no right of suit against C. to whom the land had been transferred. **Held**, by the Privy Council, reversing that decision, that the agreement created a lien on the land, and that no positive law was shown to forbid the giving effect to such agreement.

The owner of property subject to a lien or charge can in general convey to another no title higher or more free than his own: it lies always on a succeeding owner to make out a case to defeat such prior charge. The law in India does not enable a purchaser of land to look only to the apparent title in the Collector's books, or the presumed title of the owner in possession; and it is beyond the province of a Court of Justice to give effect to the title of such a purchaser to the extent of defeating a prior lien or charge.

Conceding that a purchaser for a value, *bond fide*, and without notice of the charge, would have an equity superior to A's right. **Held** that a purchaser in good faith by C. had not been proved.

If the English doctrine on this subject be adopted, as the rule prescribed by justice, equity, and good conscience, its qualifications and restrictions should not be rejected.

THE appeal was brought from a decree, reversing a decision in favor of the plaintiff, so far as it established a lien on certain landed property, called the muttah of Tirupassur. This muttah, which was the property of the first defendant (on the record, had been, as the plaintiff alleged, duly charged in his favour by the first defendant, as a security in respect of the non-delivery of the title deeds of another estate, called the muttah of Ekattur, purchased by the plaintiff from him. After the creation of such charge the property was transferred, first to the third defendant, and by him, pending the present litigation, to the last defendant on the record, Mr. Ouchterlony.

The plaintiff alleged the existence, continuance, and validity of his security, as against the third and the last defendant.

In the Court of original jurisdiction, and in the first Appellate Court, the plaintiff succeeded in establishing his charge ; but on appeal to the Sudder Dewanny Adawlut at Madras, the decree was reversed.

The plaintiff is a Christian, and, from his name, appears to be an Armenian ; the first defendant is the son of the second defendant, and both are Mahomedans ; the third defendant is a Hindoo ; and the last on the record is a Christian, and a British subject.

Though both the third and last defendants pleaded, in effect, that they were *bond fide* purchasers for value without notice, yet they did not prove that defence, though the plaintiff charged notice and collusion with the first defendant.

It appeared in evidence that, on the non-production of the title deeds of the estate Ekattur, it was promised, on the part of the seller, that they would be produced in a few days ; but this promise was not fulfilled, as they proved to be in the possession of a prior incumbrancer. The plaintiff was obliged, in order to procure them, to pay of this incumbrance ; and, having previously paid a large part of the purchase-money, his whole payments exceeded the purchase-money by a considerable sum, (Rs. 3,810), for which, with interest, he claimed to be indemnified by his alleged security on the pledged estate. The contract of pledge contained also a further stipulation of purchase.

The decision of the Sudder Dewanny Adawlut, so far as it respects the enforcement of the lien against the third and last defendants, appears to have proceeded upon the ground that the principles of the English law, applicable to a similar state of circumstances, ought not to govern the decision of that suit in those Courts. This was correct if the authoritative obligation of that law on the Company's Courts were insisted on. There is, properly, no prescribed general law to which their decisions must conform. They are directed in the Madras Presidency to proceed generally according to justice, equity, and good conscience. The question then is, whether the decision appealed against violates the direction or not. The Court of Appeal, reversing the prior decisions, has decided that the contract was not operative as a hypothecation, or pledge, even between the parties to it. Yet the evidence shows that the plaintiff looked, not simply to the personal credit of the person with whom he contracted, but bargained for a security on land. If any positive law had forbidden effect to be given to the actual agreement of the parties to create that lien, the Court, of course, must have obeyed that law. If the contract of lien were imperfect for want of some necessary condition, effect must have been, in like manner, denied to it as a perfected lien. But nothing of this sort is suggested in the pleadings, or proved. It is not shown that, in fact, the parties contracted with reference to any particular law. They were not of the same race and creed. By the Mahomedan law, such a contract as the one under consideration, for a security in respect of a contingent loss, would be one, not of pawn but of trust (4 Hedaya, p. 208. tit. pawns). It is not declared that any writing or actual delivery is essential to the creation of such trust by that law ; but as the contracting parties are not both Mahomedans, that law would not have governed the question of the validity and force of their contract, even in the Supreme Court. The plaintiff is a Christian ; the contract took place with parties living within the local limits of the Supreme Court of Madras, though it related to land beyond them. It is not shown that any local law, any *lex loci rei sitæ*, exists forbidding the creation of a lien by the contract and deposit of deeds which existed in this case ; and by the general law of the place where the contract was made, that is, the English law, the deposit of title-deeds as a security would create a lien on lands ; though, as between parties who can convey by deed only, or conveyance in writing, such lien would necessarily be equitable. In this case there is an express contract for a security on the lands, to which, no law invalidating it, effect must be given between the parties themselves. The circumstance that the plaintiff had not sued for a specific performance of the contract to sell the land to him, on which the Sudder Court laid some stress, does not in the least

affect his claim for a lien. By the contract this latter interest is immediately created, and expressed to be immediate. The sale is contemplated as future. The first defendant's own acts, in dealing with his land as he did, would effectually bar him, and those taking derivative titles from him, from insisting on this objection, if it had had any original foundation of justice and equity to support it; but, in truth, they are distinct and independent parts of the same contract.

The contract then created between the parties a lien on the land. It is immaterial for the decision of this suit to consider or decide whether that lien between these parties, looking to the power in the first defendant to convey without writing, is legal or equitable: Doe, on the demise of Seebkristo *vs.* East India Company, 6 Moore's Indian Appeals, 267.

The question to be considered is, whether the third and sixth defendants respectively possessed the land free from that lien, whatever its nature. As one who owns property subject to a charge can, in general, convey no title higher or more free than his own, it lies always on a succeeding owner to make out a case to defeat such prior charge. Let it be conceded that a purchaser for value, *bond fide*, and without notice of this charge, whether legal or equitable, would have had in these Courts an equity superior to that of the plaintiff, still such innocent purchase must be, not merely asserted, but proved in the cause, and this case furnishes no such proof.

To give effect to the legal estate as against a prior equitable title, would be an adoption of the English law; and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice. The law in India has not enabled a purchaser of land to look only to the apparent title on the Collector's books, or the presumed title of the owner in possession. It is beyond the province of a Court of Justice to effect, by decision, a change so important as that which is involved in the principle of this decision.

Their Lordships must, therefore, humbly advise Her Majesty to reverse the order appealed against, and to give to the appellant the costs of the proceedings in the Court below, and of the present appeal. Any costs paid by the appellant under the order reversed must, of course, be refunded.

The 19th July 1862.

Present :

Lord Kingsdown, the Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colville.

**Decision not to be appealed from in consequence of subsequent event or devolution of interest—Averments not traversed necessarily not admitted—
Decrees of Indian Courts (Interference with, by Privy Council).**

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Anundmoyee Chowdrain,

versus

Sheeh Chunder Roy.

No subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceeding, and not an appeal, is necessary.

The strict rule that averments not traversed must be taken to be admitted, is not applicable to the Indian Courts.

The Privy Council thought it objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit.

THE appellant is the widow of one Kirtee Chunder Chowdry, who died in 1828 leaving two sons. The elder, Juggut Chunder, died a few months after his father, unmarried and intestate. The younger, Bhoobun Chunder, died in December 1844 a minor, and childless, but leaving a widow, Huromonee. Shortly after

his death, Huromonee, under an *Unoomutty puttur* or authority to adopt, which she alleged her husband had executed in her favor, on the night of his death, adopted one Grish Chunder as the son and representative of Bhoobun Chunder. And in 1847, the appellant who disputed Huromonee's right to adopt, set up an *Unoomutty puttur* which she alleged had been executed in her favor by Kirtee Chunder Chowdry on the 20th of May 1828, and, under that instrument, adopted the son of one Neelkunth Goopto as the son and representative of her husband Kirtee Chunder, and gave him the name of Bhairub Chunder Chowdry.

These rival adoptions gave rise to two suits, which it will be convenient to distinguish by the numbers 316 and 317, by which they were known in the Sudder Dewanny Adawlut.

No. 316, in which the present appeal is presented, was instituted in 1849 on behalf of Bhairub Chunder Chowdry, a minor, by his natural father Neelkunth Goopto, as his well-wisher or next friend, against the present appellant Huromonee, and several other persons as defendants. The plaint stated the execution of the *Unoomutty puttur* by Kirtee Chunder; the adoption of the infant plaintiff under it; his title, by virtue of that adoption, to one-third of the estate of Kirtee Chunder in immediate possession and to the other two-thirds, subject, as to one of them, to the interest of the present appellant as heiress at law of her eldest son; and subject, as to the other, to the life-interest of Huromonee as heiress of her husband. And it claimed the possession of one-third of the zemindary and some personal property as against the two female defendants with wassilat; and as against Huromonee, the cancelment of the adoption made by her as illegal. The other defendants had no interest in the property, and seem to have been made defendants only because they had taken part in the adoption by Huromonee. To this suit, therefore, the appellant, though no doubt a friendly, was a substantial, defendant.

Shortly before the institution of No. 316, Huromonee had commenced the suit No. 317. The only defendants to this were the appellant and another woman. It set up the adoption made by Huromonee, and claimed by virtue of that, and other acts of the appellant, the whole of the property as against her, disputing the adoption made by her. In this suit the appellant pleaded the *Unoomutty puttur* alleged to have been executed by her husband, and insisted on the validity of the adoption made by her under it.

Huromonee died before either suit came to a hearing, and certain proceedings were had by which Grish Chunder Chowdry, the infant adopted by her, became, through his well-wisher or next friend, a defendant in No. 316, and the plaintiff in No. 317.

The two suits were heard together by the Principal Sudder Ameen, in whose Court they were pending. In No. 317, he decided in favor of the plaintiff Grish Chunder, affirming the validity of his adoption by Huromonee; treating the *Unoomutty puttur* set up by appellant as not established by proof, and the adoption thereunder as invalid. Upon the same grounds he decided against the title of Bhairub Chunder in No. 316, and dismissed that suit with costs.

Appeals were preferred to the Sudder Dewanny Adawlut against both decisions. That in No. 2316, was, in the first instance, an appeal on behalf of the infant plaintiff Bhairub Chunder, by his father and well-wisher. The appeal in No. 317 was that of the present appellant.

Before the appeals were heard, Bhairub Chunder died; and the present appellant (being, on the assumption of his adoption being valid, his heiress-at-law) seems, on her own application, to have been substituted for him as appellant in No. 316, notwithstanding her character as defendant in that suit. She thus became regularly or irregularly, *domina litis* in both appeals.

These appeals were heard by the Sudder Dewanny Adawlut in 1855. In No. 317 the Court reversed the decision of the Principal Sudder Ameen, mainly on the

ground that Bhoobun being an infant at the time of his death, had no power to make the instrument under which Huromonee claimed the right to adopt, without the consent of the Court of Wards; and therefore that the adoption of Huromonee under it was wholly void. Against that decision there has been no appeal.

In No. 316, the Court dismissed the appeal, and confirmed the decision of the Zillah Court, holding that the *Unoomotty puttur* under which the appellant adopted Bhairub Chunder had not been proved, and was wholly unworthy of credit. Against this decision, and that of the Court below, the present appeal is proposed.

The decision in No. 317 has determined the interest of the party claiming under the adoption by Huromonee; and the various deaths that have occurred, have vested the whole interest to the estate, at least during her life, in the appellant. It is not therefore surprising that the present appeal has come on *ex-parte*. Their Lordships, however, do not the less feel the difficulty in which every *ex-parte* appeal places them, of having to decide the questions raised after hearing one side only.

The first and most important question is, whether the decision of the Principal Sudder Ameen was, when pronounced, a correct decision of the issues then pending before him between the then parties to the suit? No subsequent event or devolution of interest can affect this question; because, to give effect to these, should justice require it, would be the office, not of an appeal, but of some supplemental proceeding.

The question in the suit was the title of Bhairub Chunder, as the adopted son of Kirtee Chunder, to recover certain property, and to have another adoption cancelled. The foundation of this title was the *Unoomotty puttur* under which he was adopted. If the proof of that failed, he had no title, and his suit was properly dismissed.

It is not now contended that there is before their Lordships, or was before the Principal Sudder Ameen, testimony strong enough to establish the validity of the instrument if impugned. But it is argued that the evidence which the Principal Sudder Ameen treated as too weak for that purpose was irregularly taken, because it was taken in No. 317, to which Bhairub Chunder was not a party. It is further argued that proof of the instrument by witnesses was unnecessary, because the answer of Huromonee did not impeach, and must, therefore, be taken to have admitted its validity. These two objections shall be considered separately.

Their Lordships are not satisfied that the depositions of the witnesses examined in support of the *Unoomotty puttur* (which are not before them) were not substantially taken in both the suits, which were clearly tried together. At page 73, line 33 of the Appendix, the father and next friend of Bhairub Chunder, in his reasons of appeal, comments on this evidence; and at the hearing in the Sudder Dewanny Adawlut the appellant's Counsel argued upon it. But suppose it to be out of the case, what is the result? Why, that the plaintiff has given no evidence whatever in support of an averment material to his title. The only question that can remain is, whether there has been an admission of that averment sufficient to relieve him from the necessity of giving any such evidence.

Their Lordships cannot answer this question in the affirmative. The answer of Huromonee denies generally the truth of the plaintiff's case. If it does not directly impugn the instrument, it does not in terms admit it. The defence is no doubt mainly directed to the avoidance of the adoption by the appellant by setting up the adoption made by the defendant Huromonee; but it does not admit that, if the latter adoption fails, the other is necessarily valid.

Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the plaintiff and Huromonee, would have dispensed with the necessity of proving the instrument. But when the case was heard, the issue was no longer one between the

plaintiff and Huromonee. She was dead, and Grish Chunder has been admitted as a defendant on the record. He did not come in as the heir of Huromonee, for, if he were duly adopted, his title was paramount to hers. He would not then have been bound by her admissions of an instrument (even had they been more unequivocal than they are) the execution of which had been formally made one of the issues in the suit. Their Lordships, therefore, can see no ground for disturbing the decree of the Principal Sudder Ameen.

The next question is, whether any case has been made for reversing or varying the decree of the Sudder Dewanny Adawlut. It has been argued that the substitution of the appellant for Bhairub Chunder, which made her both plaintiff and defendant in the suit, was grossly irregular. It may have been so, but it was an irregularity of her own seeking. If she had not taken up the appeal, it must either have been prosecuted by the well-wisher and next friend of the deceased infant (if the forms of the Courts permitted this), or abandoned by him. Their Lordships must assume that the decree of the Zillah Court, which they think to be correct, would, in either case, have stood. The appellant on her own application has been allowed, perhaps irregularly, to contest the correctness of that decree. She has done so unsuccessfully, and it is but fair that she should be left to pay the costs of the proceedings.

The appellant is now entitled, as a Hindoo female heiress, to the whole estate; if she makes any further adoption, the validity of that adoption will be probably tried between the party adopted, and those who will be the heirs of her husband on her death. In any such suit, it is difficult to see how these decrees can be admitted as evidence for the purpose of showing the invalidity of the instrument of adoption.

At any rate, their Lordships think it would be objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit, and the only order which they can recommend Her Majesty to make on this appeal is, that it be dismissed.

The 9th December 1862.

Present :

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and
Sir J. W. Colvile.

Sale of Estate in execution of decree— Regulation XX. 1795—Onus probandi
(Title to land in old purchaser).

On Appeal from the Sudder Dewanny Adawlut at Agra.

Rajah Mohesh Narain Sing,

versus

Kishramund Misser and Rughobur Dyal Sing.

It is contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure to hold that when, for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit.

The sale of an estate in execution of a decree under Regulation XX. 1795 is not impeachable on the ground that the Court, in ordering the sale, dealt directly with the Collector of the Zillah instead of with the Board of Revenue; the principal object of that Regulation having been the security of the public revenue. Nor was the Collector precluded from accepting a lower *bond fide* bid and rejecting higher bidders who could not satisfy him that they were real bidders, particularly in a case where, on several previous occasions, sales were attempted and rendered abortive by the highest bidders having turned out unable or unwilling to complete them.

It would be monstrous to make the title to land in a purchaser depend, years after it has accrued and possession has been enjoyed under it, on his proving the same affirmatively.

THIS is an appeal from a decree of the Sudder Dewanny Adawlut at Agra, which reversed a decree of the Civil Court of Zillah Jounpore, in favor of the appellant. The suits in which these decrees were made respectively on the 23rd February 1855 and the 10th May 1856 were brought by the appellant to recover back possession of an estate, called the Talooka Bazar Rajah, Pergunnah Gudwarra, which had been the property of his father, Rajah Surnam Sing, and which had been sold in execution of a decree obtained by one Petumbar Mookerjee in May 1830 in a suit first instituted by him in 1822 for the recovery of a debt. One Barwise, in 1837, had become, by purchase, the holder of this decree; and the respondents claimed by purchase for a valuable consideration, and through mesne conveyances, from his representatives, who had been purchasers at the sale held in execution of the decree. The claim in the present suit was rested not upon any supposed miscarriage in the determination of the original suit, nor any defect in the title of Barwise to the benefit of the decree, but on certain alleged informalities and defects in the course of executing that decree, and the sale under it.

In order to understand the questions now raised, a short statement of the material facts will be necessary.

It will be observed that the litigation commenced in 1822, and that the decree in favor of the original plaintiff was obtained in 1830; seven years were then passed in fruitless attempts by him to carry it into effect; his hopes or his means becoming exhausted, he was induced, for a valuable consideration, to make over this decree to an Englishman of the name of Barwise, who, being in the service of the Government, it was supposed probably by both parties, might be more successful in defeating the various devices by which its execution had been up to that time prevented. It is immaterial to the decision of this case whether he purchased on too favorable terms, or succeeded in obtaining too great advantages. It may have been so—on that we pronounce no opinion. It was not, however, until the 6th June 1845, and after he had been murdered, as alleged, by the appellant, that his representatives obtained the order from the Zillah Court of Jounpore, on which the sale actually took place, the validity of which is questioned in the present appeal.

We propose now to examine the objections to this sale, advertiug only, as we proceed, to the previous circumstances, so far as may be necessary for the understanding and disposing of these objections. The order for this sale will be found in page 26 of the joint Appendix, No. IV, and is as follows, dated June 6, 1845:—

“This case was brought up this day. It was found from the Report of the Moonshee of Execution of Decrees, that 48,522 rupees 0 annas 1 pice, the total estimated value of the claim, composed of 46,856 rupees 14 annas entered in the Report of the 22nd November 1844, and 1,664 rupees 11 annas on account of present interest up to the 22nd May 1845, and 8 annas for costs, is quite correct. As it appears from the accounts to be right and proper that Talooka Bazar Rajah, embracing sixty-three original and dependent villages, be sold to realize the amount above specified, it is therefore ordered that a copy of this proceeding be sent to the Collector of this Zillah, to apprise him of the above-mentioned facts, in order that the said Collector, after the issue of the second notification, may put up to sale the aforesaid estate, the property of the defendant the debtor, for the sum claimed as above, and afterwards inform this Court of the result.”

It will be observed that this order dealt directly with the Collector of the Zillah, and is silent as to the Board of Revenue. This, it is said, is in breach of the Regulations on this matter, then in force, of 1795, Regulation XX, which directs that, when any Court of Civil Judicature shall have occasion to sell lands in satisfaction of a decree, it shall transmit a copy thereof to the Board of Revenue, which is, with all practicable dispatch, to cause lands to be disposed of at the Presidency, or in the district in which the lands are situated, as they may deem most advantageous to the proprietor. The objection founded on the apparent non-compliance with this Regulation was taken, both in the Zillah and Sudder Courts in this

action, and overruled by both—and, their Lordships think, quite properly. It appears that, when a former order for sale had been made by the same Court in 1843, this Regulation had been fully complied with; that the Commissioner had authorized the sale of the whole talooka; that as many as four sales had taken place, ineffectual and nominal only, because the best bidders on each occasion were men of straw, who had, no doubt, been put forward for the very purpose of rendering the decree abortive. It is said that the order, directing these former sales, must be considered as having been made in a different suit from that in which the order now in question was made, for that the proceedings had been taken off the file, and the lands to be sold and the sums to be recovered were different in the two orders. There is no foundation for either of these assertions. It would be contrary to general principles, and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when, for any reason, satisfactory or not, the execution of a final decree in a suit fails, or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit. Nor is it true, in any material sense, that either the properties to be sold, or the sums to be recovered, were different; in both the same whole talooka, rendering to the Government the same jumma, was directed to be sold, and for the same principal sum; but the number of villages comprised in it, owing to some inaccuracy, was differently stated, and the total sum was increased in the later order by adding the interest which had accrued, due in the interval between the two, with a few annas for the costs. The principal object of the Regulation in question was the security of the public revenue, as appears not merely from its own preamble, but by the modifications which were made in it by Regulation 7 of 1823, tit. ii.; and this object had been fully answered by the communication to the Commissioner in 1843, and the proceedings which were taken by him upon it. If this, therefore, had been a question raised between the original parties to the suit, and if the objection had been made promptly after the sale had taken place, their Lordships would still have been of opinion that it had received its proper answer in the Courts below; but it must never be forgotten that they are now called upon to give effect to it as against a purchaser for a valuable consideration, and, so far as appears, entirely without notice, in a suit commenced in July 1854, the disputed sale having taken place in July 1845. What safety could there be, except by the Statute of Limitations, for any man's title, where a judicial sale had taken place, if he were bound to satisfy himself of the decree-holder's compliance with every one of the many formalities prescribed by law for the conduct of it. This is a remark which their Lordships must bear in mind in considering the objection to which they now pass.

The next objection to be noticed is the alleged want of due notification of the time and place of sale. At the time when this sale was to take place, this matter was regulated by Regulation XX Section 12 of 1795, which requires notices to be affixed one month before the day of sale in the Court room of the Dewanny or Zillah, the Collector's office, in the principal town or village, and in the office of the Secretary of the Revenue. Now if it be taken that the burden of proof in respect of these notices can be properly cast on the respondent, it certainly does not appear to their Lordships that, in respect of all of them, it is clearly made out that they were duly given; but they are of opinion that it cannot be so cast, considering how he claims, at what distance of time the objection is made, and the extreme difficulty, if not impossibility, of satisfactorily proving a fact of this nature under such circumstances as are before them. In this country it is in many cases required by statute that notices should be affixed on the walls or doors of Courts, or in other specified places, and for certain specified times, in order to give jurisdiction to Magistrates to do certain acts which are speedily to follow. In such cases there is no injustice in calling upon the party who moves the Magistrates to exercise their statutory jurisdiction, to prove that these requirements have been complied with. But it would be monstrous

to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time; in others, where the document ought in strictness to be filed, it is but too common for the officer whose duty it would be to file it to be neglectful.

Their Lordships are of opinion, therefore, that the *onus* lay upon the appellant, and that he has not discharged himself of it.

It was said in regard of another objection, and might be said in regard of this, that at the time in question he was in prison on the charge of murder; and that was so: but it is clear that he at least knew of the time fixed for the sale, and was able to apply to the Court, because he presented a petition on the 14th July 1845, to the Zillah Court, for its postponement for two months, which was heard and rejected by the Sudder Amcen of that Court.

The remaining objection is to the manner in which the sale was conducted. It will be remembered that on several preceding occasions, when sales were attempted, the highest bidders had turned out to be unable or unwilling to complete them, and so they had been rendered illusory; the Collector, therefore, had been very properly cautioned to satisfy himself of the trust-worthiness of a bidder, before he concluded the sale in his favor. On the present occasion, after the representatives of Mr. Barwise had bid a sum of 48,000 rupees, being a little below the amount of the decree, one Hunnooman Pershad bid 49,000. The Collector asked if he was prepared with the deposit money; he was not. He was asked who and what he was: he said he was a servant, and was bidding for Ramdas of Sultanporc. He was asked whether he held a mooktarnama from Ramdas, and he said he did not. On this he was rejected as a bidder. Thereupon one Shunker Loll bid 50,000 rupees, and he was questioned as Hunnooman Pershad had been. It does not appear whether he answered that he was prepared with the deposit or not, but he stated that he was bidding for one Sheo Lall, a banker of Dostpoor. Like the former bidder he had no mooktarnama. The Collector rejected both their biddings, and there being no other bidder, knocked the estate down to the representatives of Barwise for 48,000 rupees.

Both Narain Sing and these two persons, but not either Ramdas or Sheo Lall, petitioned the Court against this proceeding of the Collector. It was urged that a production of the deposit ought not to have been insisted on before the estate had been knocked down, and that the effect of the proceeding was to deter bidders, and so diminish the amount for which the estate was sold. Certainly the payment of the deposit could not be required before the acceptance of the bidding, and the knocking down of the estate; but the Collector was bound, in their Lordships' opinion, to satisfy himself reasonably that these persons were, what they professed to be, real bidders, and that the course which he took for that purpose was perfectly justifiable; and so it was held in the Court below—their Lordships think quite correctly: they see not the least reason for believing that it was calculated to deter persons really wishing to buy from offering their biddings, or in any way to damp the sale. It might be unusual; but the circumstances were unusual; as practices had been suffered before in this case, which had made the sales under the order of the Court mere mockeries, available only for the purpose of defeating the course of justice, the Collector, forewarned, was bound to take care that this sale should be a reality; which it could not be, unless care was taken to distinguish between real and sham biddings. The result shows that his conclusions were correct: if there were such persons as Ramdas or Sheo Loll, or if either of them had, however, irregularly deputed Hunnooman Pershad or Shunker Loll to bid for them, we may be quite certain that claims would have been made on their behalf by way of petition to the Court. It is said that the estate was sold for less than its value. It may have been; it was certainly sold, some time afterwards, at

a great advance by the purchasers : but considering the character of the previous attempts to sell, and all the previous circumstances of the litigation, this is not to be wondered at. As a fact in itself, it is immaterial to the decision of the case : it is enough that the sale was a real one, conducted justly and regularly.

Their Lordships, in a judgment necessarily so long, have thought it right to take no notice of several matters, important in themselves, but not affecting their decision ; they have now disposed of the various points relevant to that decision, and which were urged by the learned Counsel for the appellant with their usual zeal and ability ; but they cannot pass from this case without the expression of their surprise and deep regret that such a case should have been possible under the system of jurisprudence prevailing in any country under the British dominion.

“ ————pudet hæc opprobria nobis,
“ Et dici potuisse et non potuisse refelli.”

The subject-matter of the original suit a debt, it should seem undisputed, or at least as to which, in substance, no serious dispute was possible ; where the plaintiff's difficulty had not been to establish his right to the judgment of the Court in which he sued, but to make that judgment available when obtained, though the funds were ample for the purpose. By fraud and chicanery, by every possible abuse of the forms and procedure of law, by force and violence, even, it is to be greatly feared, to the shedding of blood, justice was evaded and defied for fifteen years, from 1830, when the decree was pronounced to 1845, when the final sale took place. The original plaintiff, wearied out with the long delay and expense, fain to sell the benefit of his decrees ; the unhappy man who had been substituted for him losing his life, while vainly striving to realize its fruits. And now, in 1862, their Lordships have been called on to dispose of a suit, in which it is sought to invalidate that whole proceeding as against a purchaser for value, the second in succession from the execution creditor, against whom, or the party from whom he immediately purchased, no fraud, no collusion, no knowledge of the supposed defects in the title is alleged. They have had to deal with a record of nearly three hundred pages in folio, setting out more than three hundred documents and depositions. Their Lordships do not intend hastily to cast censure on any individuals ; the materials are not before them for that purpose, nor is it within their province to do so : but it is useful to point out that a system under which all this is possible, loudly called for amendment, and, administered as it here has been, defeated the very object for which it was instituted.

They will humbly recommend to Her Majesty that this appeal ought to be dismissed with costs.

The 27th April 1863.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Privilege of administering Purohitam to Pilgrims resorting to Ramaswaram.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Ramasawmy Aiyar and others,

versus

Venkata Achari and others.

Suit for the exclusive right in the privilege of administering Purohitam to pilgrims resorting to Ramaswaram. As the privilege claimed was admitted to be capable of alienation or delegation, it was held that texts to the effect that the efficacy of the right depended on the character of the ministering priest, necessarily lost their value ; and that the principle of alienation or delegation greatly increased the difficulty of proving the continued enjoyment of the privilege, supposing that it ever existed. The Privy Council observed that functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations ; but that the privilege of exercising those functions, when alienable for money, ceases to be the subject of religious

sentiment, and becomes a mere proprietary right; and that every long-continued enjoyment of the privilege by others is of course capable being ascribed to a presumed grant or alienation of which the direct evidence is lost.

On the merits, the appellants were held to have failed to support their claim by any sufficient evidence.

THE subject of litigation in this case is the right of administering what is called Purohitam to seventeen classes or castes of the numerous pilgrims who resort to the great Pagoda and other temples in the Island of Ramaswaram.

The appellants, the plaintiffs in this suit, sue, and the respondents are sued, as representatives of the bodies to which they respectively belong. Whilst, however, the respondents are all members of an homogeneous class, described indifferently as Tadvadi and Telegu Brahmins, or as Parishai Bhattars, resident in and about Ramaswaram; the appellants are some of them Arya Brahmins, and others Gurukals; the differences between these two latter classes, their rights and privileges, being some of the matters involved in the question at issue in this suit.

The case put forward by the appellants is shortly this. They assert that, ever since the first foundation of the Pagoda, an event which they ascribe to a very remote age, the Arya Brahmins possessed the privilege, and that an exclusive privilege, of administering Purohitam to all classes of pilgrims resorting to Ramaswaram. They treat, however, this privilege as alienable, or at least capable of delegation; and state that by an instrument bearing a date which it is now agreed corresponds with A. D. 1675, the Arya Brahmins have, in consideration of an annual payment of 50 pons, transferred to a community called the Adhyena Bhattars the privilege of administering Purohitam to seven specified classes of pilgrims; and in some way or another, and at some uncertain but distant date, have conferred the same privilege over ten other classes of pilgrims upon the community of the Gurukals. They further state that the Gurukals again transferred the privilege, as to six of those ten classes, to the body represented by the respondents, which it will be convenient to distinguish as Parishai Bhattars, on the condition that the latter would account to them for 20 per cent of the emoluments derived from the exercise of the right; that a dispute having arisen between these two last-named bodies, an arbitration took place A. D. 1726, which resulted in the execution of the instrument set forth as Exhibit E. or No. 41 at page 29 of the Appendix; and that difficulties having subsequently occurred in carrying that arrangement into effect, the payment of 20 per cent on the collections was commuted for a fixed annuity of 100 pons, which, by the instrument F. or No. 43 (set forth at page 30 of the Appendix), the Parishai Bhattars some time about A. D. 1762 agreed to pay, and did, in fact, pay up to the year 1825 to the Gurukals. The appellant's plaint, after stating these facts, notices the proceedings in a suit (No. 232 of 1826) in the Moonsiff's Court, the effect of which their Lordships will consider, when they come to deal with the evidence. It also states the effect of a copper plate deed (No. 74 at page 57 of the Appendix), by which, in A. D. 1714, the then zemindar of Ramnad granted certain dues payable to him by the Parishai Bhattars and amounting to 90 pons, to a particular goddess in the pagoda on account of the Friday services. It also states some proceedings before the Collector in 1835, when that officer endeavored to compose the strife which had long existed between these rival sects of Brahmins, by an order which, as appears from the order itself, No. 80, at page 62 of the Appendix, affirmed the rights of the Parishai Bhattars to administer Purohitam to twenty-one classes of pilgrims, subject to the payment into the Pagoda of 190 pons annually; being the 90 pons for the Friday services, and the 100 pons payable to the Gurukals. This order assumed that the right of the Parishai Bhattars as to seventeen of their classes was not in disputes and it left either party, if dissatisfied with it, to bring a civil suit. The plaint, then shortly notices the proceedings in a suit of 1835, which was brought by some of the Arya Brahmins against some of the Parishai Bhattars in respect of two of the classes comprised in the Collector's order, and was dismissed by a decree of the Zillah Judge, dated the 27th of June 1840; a decree

confirmed on appeal by the Provincial Court on the 28th of December 1841. It then explains that the claim in the present suit is limited to seventeen of the twenty-one classes comprised in the Collector's order, because the remaining four belong to the Adhyena Bhattars under the deed of 1695; and further, that whilst the claim as to eleven of the seventeen classes is general, as to the remaining six, which were the subject of the instruments of 1726 and 1762, it is limited to the enforcement of the rights of the Gurukals under the latest of these documents. The particular relief prayed is a decree for the payment of rupees 2,916-10-8 being the arrears for twenty-three years of the annuity of 100 pons payable to the Gurukals in respect of the six classes of 4,400 rupees by way of damages incurred in respect of the other eleven classes; for a declaration that the Purohita Mirassi of the eleven classes is henceforth to be enjoyed by the Arya Brahmins without the interference of the Parishai Bhattars; and for an order that the Parishai Bhattars do regularly pay the 100 pons to the appellants and other Aryas and the Gurukals, or otherwise that the Mirassi as to these classes also is to be enjoyed by the appellants and other members of the Arya Mahajanum and the community of the Gurukals, without the interference of the Parishai Bhattars.

The case set up by the respondents in opposition to that of the appellants is, that their ancestors were established in the place or neighbourhood, and invested with the privilege of administering Purohitam to pilgrims resorting to Ramaswaram, by a certain Rajah, about 1,000 years ago; that they afterwards from generation to generation enjoyed this privilege, and the emoluments resulting from its exercise, and so acquired the title of Parishai Bhattars; that the zemindars of Ramnad imposed an annual tax upon them of 160 pons payable out of their receipts, which they continued to pay until the time of one Vijaya Raghundha, who granted 100 out of the 160 pons to the community of the Gurukals on their complaint of having no income in the Pagoda, and afterwards granted the remaining 60, with some other dues payable by the Parishai Bhattars (making 90 pons in all), for the Friday services of the Pagoda.

They treat the latter grants as made by the copper-plate deed of 1714; do not show in what precise form or by what instrument the first was made; and assert that after 1714 the whole of the 190 pons was paid into the Pagoda. They state that in 1827 there was an attempt to settle the disputes between their community and that of the Arya Brahmins by a native punchayet (the failure of which is much to be regretted); that afterwards, in the course of an enquiry before the Sub-Collector, the Aryas admitted that in respect of seventeen classes, there was no dispute as to the right of the Parishai Bhattars, and that the Collector's order of 1835 was made on that admission. They further insist strongly upon the decrees in the suit of 1835 as a bar to the present suit, which they also contend is barred by the Regulation of Limitation.

The issues settled in this suit (see Appendix p. 24,) threw upon the appellants the burthen of proving, *first*, the hereditary and exclusive right of the Arya Brahmins to administer Purohitam to all castes of people frequenting Ramaswaram as pilgrims, and their ancestor's enjoyment accordingly; *secondly*, the grant, as alleged by way of dowry, of the ten castes to the Gurukals, and that the Parishai Bhattars had since rented from the Gurukals six of the ten castes, undertaking to pay them annually two-tenths of the emoluments under a written document which had been acted upon; *thirdly*, that under another document this liability had been commuted for an annual payment of 100 pons, and that the latter had been paid up to 1825; and *fourthly*, that the defenders had taken illegal possession of the eleven other castes, and that with the exception of these and the castes held by the Adhyena Bhattars all other castes were enjoyed by the Arya Brahmins. The issues which the respondents were called upon to prove were, 1st, the alleged right of the Parishai Bhattars to perform Purohitam to all castes, that the Arya Brahmins had no title thereto, and had come to Ramaswaram since a particular

late; 2nd, that they had originally paid an annual tax of 100 pons to the zemindar, and subsequently, with his consent, paid the 100 pons annually to the Gurukals for their maintenance.

The suit was first heard by the Judge of the subordinate Court of Madura, who, on the 19th of February 1855, made a decree in favor of the appellants. From this there was an appeal to the Civil Court of Madura, and the Judge of that Court on the 1st of August 1857, reversed the decree below, and dismissed the suit on the ground that the appellants had failed to prove the exclusive right which they claimed; but directed each party to pay their own costs. A special appeal was then preferred to the Sudder Dewanny Adawlut of Madras. The Court, on the 13th of December 1858, dismissed the appellants' suit with costs, on the ground that their claim was barred by the Regulation of Limitation, the only question which it allowed to be argued before it.

The present appeal is general. It had been very fully and ably argued before this Committee, both upon the merits of the case, and also upon the question whether the suit is effectually barred, either by the decrees in the former suit of 1835, or by lapse of time under the Regulation of Limitation.

Their Lordships propose, in the first instance, to deal with the merits of the case.

The first observation that arises is that the existence or non-existence of the original and exclusive right to administer Purohitam to all classes of pilgrims, which is claimed by the Arya Brahmins, is an issue which goes to the whole case. It is true that that part of the claim which consists of the arrears of the annual payment of 100 pons, under the instrument of 1762, is founded upon contract. But the contract is one between the Parishai Brahmins and the Gurukals, and it is difficult to see how the appellants, suing on behalf of the community of Arya Brahmins, can establish any title to relief in respect of this part of the case, unless they prove that the title of the Gurukals to these six castes was derived, as alleged in the plaint, from the earlier and original title of the Aryas, and was so held by the Gurukals that the subsequent disposition of the castes must be taken to have been made for the benefit of the Arya community, as well as for that of the Gurukals.

What, then, are the proofs adduced in support of this first and principal issue?

The earliest in date consists of extracts from one of the Puranas. These, like the statements in the pleadings of the appellants' case, carry us far beyond the bounds of legal or historical evidence. But it is argued, and fairly and properly argued that these ancient books may legitimately be used as evidence that a certain state of facts, or a certain state of opinion, existed at the date of their compilation. That date is sufficiently uncertain; for we are not told when this particular Purana is supposed to have been written; and it appears from the writings of eminent Orientalists, that the period during which the eighteen recognized Puranas were composed is a very wide one, extending probably from the eighth to the sixteenth century.

Evidence of the appellants' right, dating even from the latest of these epochs, would of course be most valuable. Their Lordships, however, fail to find in the extracts before them satisfactory proof that at the time when this Purana was compiled (whenever that may have been), the Arya Brahmins were in the enjoyment of the peculiar and exclusive privilege which is now claimed by their descendants.

There are passages which show that a community known as Arya Brahmins then existed at Ramaswaram, and embody the legends concerning the miraculous origin of their ancestors, and their migration, at the summons of Rama, to the southern coast, from their native seat in Oudh. Other passages undoubtedly recommend in strong terms the ministrations of the Arya Brahmins, and imply that the full spiritual benefits of a pilgrimage are not to be obtained without them. But these do not lead with any certainty to the conclusion that even at that distant

period all the pilgrims to Ramaswaram in fact resorted to the Aryas or Purohitam, or were under a positive and well-recognised obligation to do so. The very mode in which the peculiar efficacy of the ministrations of the Aryas is pressed leads to the inference that even then there was some variety of practice and opinion in this matter. Part of the Purana cited at page 102 of the Appendix is in the shape of a dialogue, wherein one of interlocutors begins by expressing his doubts whether *puja* should be offered through the instrumentality of the Aryas, doubts which are of course ultimately removed. Taking the authority of these texts at the highest, —and it must be remembered that there is little or no evidence as to their authority,—their Lordships cannot find that they do more than enjoin upon pilgrims who wish to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the Aryas for their offices. They do not show that the duty was universally recognized as imperative, or that the enjoyment of the privilege, as it then existed, was exclusive.

Again, the value of the texts, such as it is, as evidence in support of the appellants' title, is in their Lordships' opinion much diminished by the consideration that the privilege now claimed is admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that by positive ordinance or by traditionary usage the privilege of administering certain religious rites had become vested in a particular class of priests, so that in the contemplation of all faithful Hindoos the efficacy of the rite must for all time depend on the status or character of the ministrant. When the principal of alienation or delegation is admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force.

Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed. Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations. But the privilege of exercising these functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes a mere proprietary right; and every long-continued enjoyment of the privilege by others is of course capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost.

That the present claim of the appellants, is not supported by any general religious feeling or conviction on the part of the Hindoos, whether founded on the texts of the Puranas or independent of them, may be inferred from the very nature of the disputes which have continued for so many years. It is clear that during that long period there has been great diversity of practice and opinion amongst those who resort to the Pagoda; that out of the vast concourse of pilgrims from all parts of the Dekhan, if not of India, some have sought for Purohitam at the hands of the Aryas, others at the hands of the Parishai Bhattars, others, again, at the hands of the Adhyena Bhattars; probably as they have been moved by considerations of race, language, district, or caste. But we have more particular evidence upon this point in the Sreemokum of Sunkar Acharyar which was produced in evidence in the suit of 1835, and is referred to in the pleadings of this suit. That document was in the nature of a certificate from a person described as the High Priest of all the Hindoos of the South of India, and was strongly adverse to the claim of the Aryas. Mr. Elliot, who, as Judge of First Instance, decided the suit of 1835, felt it to be of sufficient weight to relieve him from the necessity of pursuing the enquiries which he had directed through pundits touching the authority of the texts from the Puranas. The appellants themselves, in their pleadings, seem to admit the general authority of Sunkar Acharyar, but endeavour to take off the effect of his certificate by telling a not very credible story of his having given it when in a fit of irritation against the Aryas. They have also produced, by way of answer to it, the Exhibits No. 28 and 30, at pp. 26 and 27 of the Appendix. It is sufficient, on this part of the case, to observe that the effect

of these conflicting documents is at most to leave the question in doubt, and that the appellants cannot adduce, in support of this claim, anything like a clear concurrence of opinion upon the part of those who may be supposed to be at the present time authoritative expounders of the ceremonial and law usages of the Hindoo religion.

We now proceed to consider the effect of the other documentary evidence.

The documents which purport to be the earliest in date, except the Puranas, are the Deed D, No. 40, said to have been executed to the Aryas in A. D. 1675, by the Adhyena Bhattars; the copper-plate Deed produced by the respondents dated 1714; the Deed E, No. 41, said to have been executed by some on behalf of all the Parishai Bhattars to the Gurukals in 1726; and the subsequent Agreement F, No. 43, between the various parties, which purports to have been executed in 1762.

The first of these can at most prove that the Adhyena Bhattars, who are not parties to this suit, claim under a deed, purporting to be of considerable antiquity, the right of administering Purohitam to seven classes of pilgrims, other than the classes which are the subject of this litigation, under a title derived from the Aryas. The Adhyena Bhattars are said to have been since dispossessed of four of these seven classes by the Parishai Bhattars. But whatever may be the merits of that dispute they are not in question in this suit. This deed can prove nothing here except that in 1675 the Aryas claimed the right of disposing of the privilege as to these particular classes of pilgrims, and that the Adhyena Bhattars then admitted their title.

The effect of the Deeds E and F (if any) upon the issue which we are now considering, *viz.*, the original and exclusive right of the Arya Brahmins to administer Purohitam, is limited to the six classes of pilgrims, which are the subject of these instruments. They do not touch the eleven other classes that are in question in this suit.

Their genuineness is questioned by the respondents, who give an account of the origin of the payment of 100 pons that is inconsistent with them. It has been argued that suspicion is cast upon them by the circumstance that no mention is made of them in the proceedings in the suit between the Gurukals and the Aryas in 1807, although the Parishai Bhattars are there stated to possess the privilege of administering Purohitam to these six classes, and to be subject to the duty of paying 100 pons annually to the Gurukals, and that nothing was heard of them until the suit of 1862. It has been further argued that there is no proof of the custody whence they came, or other evidence to support them. Notwithstanding these arguments, their Lordships are disposed to deal with the case as if both these deeds, as well as the copper-plate deed of 1714, were genuine, they think the two former may well stand with the latter.

The copper-plate deed is upon the face of it nothing but the grant of certain subjects in favor of the goddess named in the heading of it, "on account of the Friday services." The annual payment of the Parishai Bhattar on this account appears on the whole evidence to be limited to 90 pons. This instrument, therefore, proves nothing as to the annual payment of 100 pons to the Gurukals, or its origin. It undoubtedly proves that in A. D. 1714 the body which the respondents represent was known as "Parishai Bhattars," a title which implies some connection with pilgrims, and that as such, they carried on a business which may reasonably be inferred to have been the administration of Purohitam to some classes of pilgrims. And even if it be assumed that those classes of pilgrims included the six which are specified in the deeds E and F, that hypothesis is not necessarily inconsistent with these deeds, for the earlier deed E does not purport to be the original grant of these classes, or to show how the administration of Purohitam to them by the Parishai Bhattars began. It recites the existence of a dispute between the Parishai Bhattars and the Gurukals touching the administration of Purohitam (a dispute which may have been of long standing), an appeal to the zemindar, a reference to arbitration, and an award which, whilst it left the administration of the rite to the six classes with the Parishai Bhattars, imposed upon them the duty of paying 20 per cent on their

receipts to the Gurukals. The two deeds, E and F, therefore, are not inconsistent with the copper-plate deed which the respondents may be taken to have proved, though they are inconsistent with their allegations, touching the origin of the payments of 100 pons, which they have failed to prove. From the three documents taken together it follows that before 1726, and possibly before 1714, the Parishai Bhattars were in the exercise of the functions involved in the administration of Purohitam to some classes of pilgrims, including, or at least extending to, the six classes of pilgrims, which were the subject of the agreement of 1726; but the material question with reference to the issue now under consideration is, to what extent that arrangement with the Gurukals, and the description of the Gurukals in the two deeds as "forming the Arya Mahajanum," or "a part of the Arya Mahajanum," or "composed of Arya Mahajanum," involve any admission or proof of the general title set up by the appellants.

The answer to this question will be best supplied by a correct definition of the relation in which the Gurukals stood to the Arya Brahmins. Their Lordships must reject the statement upon this point which is contained in the fourth paragraph of the appeal petition on page 124 of the Appendix, as inconsistent with others made by the appellants in certain stages of the proceedings and with the evidence in the cause. It was, in fact, almost given up by Mr. Rolt in his reply, and treated as a mere argument of the appellant's pleaders in answer to an objection taken by the Judge in the Court below.

The most credible account of this Gurukal community is probably to be found in the proceedings in the suit of 1807 (the piece of evidence that is next in order of date) since it was given by the Gurukals themselves when engaged in litigation with the Arya Brahmins, and was then admitted by their opponents to be substantially correct. From that it would appear that the Gurukals were Maharatta Brahmins invested with the office of performing the *pūja*, or worship, in the interior of the temples; that they were appointed by the Aryas, and were in the habit of marrying the daughters of Aryas; that the office of Gurukals was not hereditary, but that on the death of any one of them another Maharatta Brahmin was appointed in his place; that in 1807 the community of Gurukals were in the receipt of the 100 pons per annum from the Parishai Bhattars, and of fees payable in respect of other classes of pilgrims by whomsoever the right of Purohitam was administered; that the net emoluments of this community were divided amongst the members of it, and each man's share again apportioned between him and the particular Arya whose daughter he might have married. The two communities were therefore distinct bodies, differing in race; and this very suit of 1807 shows that they might have different and conflicting interests. If this be so, the description of the Gurukals as "composing," or "composed of," or "forming part of the Arya Mahajanum," must be inaccurate, unless these words imply a body in which the communities, though distinct for some, may coalesce for other purposes. Such an hypothesis is not inconsistent with the literal meaning of the words as it may be gathered from "Wilson's Dictionary."

Again, in this suit of 1807, the Gurukals seem to have claimed the right of administering Purohitam to the six and certain other classes of pilgrims as a prescriptive right, without admitting any earlier title in the Aryas. The Aryas, in their answer, seem to set up a joint interest in the emoluments, and speak of a compromise and arrangement effected by deed, bearing a date which would correspond with A. D. 1745, of which there is no proof. Therefore the case made on either side in the suit of 1807 seems to be hardly consistent with that made in the present suit as to the derivation of the Gurukals' title from that of the Aryas. And upon this part of the case, it appears to their Lordships that it would be unsafe to infer from the deeds E and F, or from any evidence that has yet been considered, either that the Aryas have a common interest with the Gurukals in the annual payment of 100 pons, or that such title as the Gurukals may have had in the six classes of pilgrims before

the arrangement of 1726, was necessarily derived from the original and exclusive title to all classes of pilgrims which is set up by the Aryas. This view of the case is in some degree confirmed by what is called the "Attachi" at page 60 of the Appendix. That paper purports to be a representation made in March 1822, when the Pagoda was under the management of the Government Officers, by some of the appellants, to the effect that the Parishai Bhattars have allowed the payment of 90 pons and 100 pons to fall into arrear. It treats the whole money as payable to the Pagoda, and therefore, in the existing circumstances, to the Circar or Government, but describes the 100 pons as the masadaum for the Sabhayar or community of Gurukals.

The rest of the documentary evidence may be reduced to three heads: the proceedings in the Moonsiff's Court in 1826; the proceedings which resulted in the Collector's Order of 1835; and the proceedings in the suit of 1835.

The first suit was brought by some Parishai Bhattars against some Aryas, and it is said to have been collusive. The plaintiffs in it asserted the title of their body to administer Purohitam to twenty-four classes of pilgrims, admitting the duty of paying annually 190 pons to the Pagoda and the community of Gurukals. But the immediate subject of the suit was the alleged invasion of this right as to a class called "Sangita," which is one of those that were afterwards awarded by the Collector to the Aryas. There is no question about that class in this suit. Other Arya Brahmins intervened by petition, and set up their general title in the Moonsiff's Court. The Moonsiff made a decree against a defendant who had admitted (it is said collusively) the plaintiff's claim, and dismissed the suit as against the other defendants. He also intimated an opinion that the suit, if properly framed, would have been brought against the Arya Mahajanum, which appeared to have been in the enjoyment of the Purohitam of the Sangita class. This judgment has been treated as a decision in favor of the Arya Brahmins, but it cannot be taken for more than an expression of opinion that they might have a good title as to the class of which they appear to be in possession.

The chief importance of the proceedings which ended in the Collector's order consists in the admission supposed to have been made before Mr. Paris, a subordinate Collector, in the course of a local enquiry made by him in 1829. It is contained in the Exhibit No. 79, at page 62 of the Appendix. It is referred to, though it is not very accurately described by the Collector in Exhibit No. 80, and is the basis of his order. It was produced in the suit of 1835, and was proved to the satisfaction of Mr. Elliot, the Judge. He says of it in his judgment: "The seristadar, it appears, wrote down in the presence of the Sub-Collector of Madura, from the mouths of the plaintiffs, that they had no dispute respecting seventeen of the twenty-five castes, but only for the remaining eight." Mr. Rolt argued strongly upon the improbability of the Aryas making such an admission so soon after the decision in the Moonsiff's Court. It does not, however, cover this Sangita caste, which alone was the subject of the suit before the Moonsiff. And the improbability, such as it is, seems to their Lordships to be out-weighed by the consideration that two Officers with local experience have, whilst the facts were still recent, treated the document as genuine, and acted upon it. It is, therefore, difficult to suppose that the admission was not made by some at least of the Arya community, and it covers fifteen out of the seventeen classes that are the subject of this suit.

The decision of the Collector was almost immediately followed by the suit of 1835. The original plaintiffs in this were four only of the Arya Brahmins. Two of them having died, twenty more members of the community intervened by petition, and seems to have adopted and prosecuted the suit. Its object was limited to the enforcement of the alleged rights of the Arya Brahmins as to two only of the classes which are the subject of this suit; but the original title of the community was stated in terms as wide as those in which it is now stated, and was distinctly put in issue. It was, moreover, supported by much the same evidence as that which

has been adduced in this suit. The decision, however, of the Zillah Judge confirmed on appeal by the Provincial Court, was that the title was not made out, and the suit was accordingly dismissed.

Their Lordships may dismiss the oral testimony with the observation that it is almost necessarily inconclusive. The question is one on which the Hindoo community has for many years been divided. Each witness, as a matter of course, deposes according to the practice, opinions, or traditions of his own family. Nor will proof of acts done even by so considerable a personage as Holkar do more than prove the practice or opinion of a particular family or individual.

Upon the whole, it is their Lordships' opinion that the evidence, though it may establish that the Arya community has existed as part, and a principal part, of the Hierarchy of this Pagoda and its dependencies from a period of remote antiquity, and that the appellants may be taken to be the actual representatives of that community, fails to show, either by documentary proof of its origin, or by such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the appellants have made the foundation of their title. It also fails to show when and how, if the right ever existed, its enjoyment was first interrupted, and consequently, leaves it uncertain, whether the interruption was caused by an invasion for which there is now a remedy; or by an actual or presumable act of alienation. It is not proved that the appellant's community was at any particular time in the actual enjoyment of the privilege of administering Purohitam to eleven out of the seventeen classes which are the subject of this suit; whilst there is evidence that the Parishai Bhattars for some time anterior to 1835 were in the undisputed enjoyment of this privilege as to nine of these classes, and exercised it, though subject to dispute, as to the remaining two. Nor is it inconsistent with the evidence in the cause to suppose that this state of things may have existed in or before the year 1714. And if the evidence as to the remaining six classes shows that the Parishai Bhattars' undisputed enjoyment of the privilege as to these six classes for nearly 150 years has been subject to the payment of the 100 pons, under an arrangement which implies an acknowledgment of an earlier title in the Gurukals, it fails, as their Lordships have already observed, to establish either that the Aryas have a common interest with the Gurukals in this annual payment, or that the title of the Gurukals to these classes was necessarily derived from the still earlier and more general title of the Aryas which the appellants assert.

The appellants, therefore, on all points, have failed to relieve themselves of that burthen which the necessities of their case, and the particular issues directed in the cause, imposed upon them. Nor is this failure the less fatal to this suit, because the respondents may also have failed to show that they had any exclusive right in the privilege which they enjoy; or because they may be under a liability to the Gurukals in respect of the annual payment of 100 pons, which may be capable of being enforced in a suit properly framed for that purpose.

Their Lordships, taking this view of the merits of the case, are relieved from the necessity of considering whether either the decrees in the former suit of 1835, or the Regulation of Limitation, present an effectual bar to this suit. They rest their decision on the ground that the appellants have failed to support their claim by any sufficient evidence.

Their Lordships, however, are of opinion that the Sudder Court ought not to have limited the argument to the single question of limitation; and that it ought not to have thrown on the appellants the whole costs of the suit. They think that the decree of 29th June 1857, sealed and signed on 1st August in that year, was correct in the direction given by it as to the costs up to the latter date; and they will, therefore, humbly advise Her Majesty that the decree of the Sudder Court ought to be varied, and to stand and be simply for the dismissal with costs of the appeal to that Court; the appellants, however, paying the costs of this appeal.

The 13th June 1863.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge
Sir L. Peel, and Sir J. W. Colvile.

Hindoo Converts to Christianity.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Charlotte Abraham and Daniel Vincent Abraham,

versus

Francis Abraham.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as he has renounced the old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced his old religion. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the converts in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property.

The convert, though not bound as to such matters, either by the Hindoo law or by any positive law, may, by his course of conduct after his conversion, have shown by what law he intended to be governed as to these matters.

The regulation which prescribes that the decision shall be according to equity and good conscience, is complied with (in the case of converts) by referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged.

THE appellants in this case are Charlotte Abraham, the widow, and Daniel Vincent Abraham, the surviving child of Matthew Abraham, deceased. The respondent is Francis Abraham, who was the only brother of the late Matthew Abraham. Matthew Abraham and the respondent were by birth Hindoos of pure, native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally, it appears, Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in India as native Christians. Matthew Abraham was by far the elder of the two brothers; for in early life when the respondent was only about two or three years old, he was employed as a clerk in the arsenal at Bellary. In the year 1820 he married the appellant Charlotte Abraham. This lady and her father and mother were also Christians; the father an Englishman and the mother a Portuguese. They were of the class known in India as East Indians. There was issue of this marriage the appellant Daniel Vincent Abraham, and another son Charles Henry Abraham, who survived his father Matthew Abraham, but died pending the proceedings brought before us by this appeal. In the year 1823 Matthew Abraham established a shop at Bellary, the business of which was continued to be carried on up to the time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, Matthew Abraham entered into a contract with Government for the supply of liquors to the troops at Bellary, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to Matthew Abraham up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the Abkarre Contract. In the year 1832, Matthew Abraham took Mr. Richardson and the respondent his brother into partnership with him in the shop-business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of Matthew Abraham, continued by him and the respondent, his brother, without any new arrangement having been come to between them. The respondent, some time before the death of Matthew Abraham, also married a Christian lady of the class known as East Indians. In the year 1842, Matthew Abraham died, leaving the appellants and Charles Henry Abraham, his widow and children. After his death the respondent continued to carry on the shop-business, and he also procured the Abkarry Contract, to be annually renewed in his name,

and carried on the business of that contract, and the distillery connected with it. In the year 1854 the appellants and Charles Henry Abraham instituted against the respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at 3,00,000 Rupees. By their plaint in the suit they alleged that the whole of the capital in the shop-business was supplied by the late Matthew Abraham, that the distillery business was carried on by him alone and with his own capital, and that the respondent was his clerk, agent, or manager in this business at a salary; that on the death of Matthew Abraham, the duty of collecting his estate devolved on the appellant, Charlotte Abraham, and she entrusted the collection, realization, and management of it to the respondent, and gave him a power of attorney for that purpose, and that the respondent had carried on both the shop-business and the distillery business by means of the late Matthew Abraham's capital; that he had made payments to and on account of the plaintiffs, and for the debts of Matthew Abraham, but not nearly to the amount which he had received. And the plaintiffs accordingly, by their plaint, prayed for accounts of the late Matthew Abraham's estate received by the respondent, including the profits of the shop-business and of the distillery, subsequently to his decease, offering to make the respondent a just and sufficient allowance for his services in managing the distillery business since the death of Matthew Abraham. The respondent, by his answer to the plaint, insisted that the appellant, Charlotte Abraham, being the widow of the late Matthew Abraham, could not claim jointly with her sons, the other plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that Matthew Abraham's situation in the arsenal was procured for him by his father; that the father demised when he, the defendant, was about two or three years of age, and that the late Matthew Abraham took charge of him, the defendant, as his guardian, and took charge also of all the property left by their father; that the shop-business had been conducted by him both in the life-time and since the decease of Matthew Abraham, but that as the deceased Matthew Abraham, and he (the defendant), were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late Matthew Abraham and he (the defendant) were brothers of an undivided native Hindoo family, jointly laboring together for their common welfare, borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for the same; and consequently that the late Matthew Abraham and he (the defendant) had an equal right to all the capital, and not the elder brother, Matthew Abraham, alone. He said that the plaintiffs, Charles Henry Abraham and Daniel Vincent Abraham, were merely junior members of an undivided Hindoo family, and that he (the defendant) by the death of Matthew Abraham had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact they were Hindoos and undivided, and must of necessity, and according to all practice and precedent, be subject to the Hindoo law, and no other. He denied that the Abkarry Contract was the property of Matthew Abraham alone, and alleged that he (the defendant) had purchased the contract after the death of the late Matthew Abraham on his own responsibility. The plaintiffs by their replication submitted that by whatever law the case was to be decided, they had all a common interest against the defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the defendant's assertion that the case ought to be decided according to the Hindoo law: and after referring to the class of East Indians having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that, in suits between parties who were

neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted that, even if the case was to be governed by the Hindoo law, the defendant had no right to any portion of the late Matthew Abraham's estate. They denied that Matthew Abraham inherited any property whatever from his father, and said that the father died an insolvent and ruined man, and that Matthew Abraham had taken charge of the defendant, and reared him from generosity, and had begun the affairs under litigation when the defendant was a boy at school, and unable to assist him in them. They insisted that Matthew Abraham and the defendant were not members of an undivided family in the light alleged by the defendant, and that even if Matthew Abraham obtained his original appointment under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition. The defendant, by his rejoinder, adopted the view insisted upon by the replication as to the principles which ought to determine the law by which the case should be decided, submitting that the plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to, in order to ascertain what law was to govern their relations to each other. It appears from the record of proceedings before us that in this stage of the suit the plaintiffs were nonsuited by a decree of the Civil Court of Bellary upon the grounds, *first*, that the plaintiff Charlotte Abraham, the widow, could not take part in the suit, she having no right of inheritance as the family stood; and, *secondly*, that no sufficient description or specification of the value of the property sued for had been given in the plaint: but upon an appeal to the Court of Sudder Adawlut, this nonsuit was set aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the subject, and that such a judgment could only be rightly pronounced upon a consideration of the usages of persons situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, Matthew Abraham, acquired by himself or of ancestral origin, after which the rights of the parties thereto, whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of Bellary, and the following points amongst others were then recorded for proof:—

“ General Point.

“ Clause 1. Each party should prove the practice of families similarly situated to theirs, whether to adhere to the Hindoo law of inheritance, or to be governed by the law of England in that respect.

“ Clause 2. Each party should also prove what has been the practice of their own family, in this respect, as shown by their acts.

“ The Plaintiffs to prove—

“ 1st. That defendant's father died insolvent, and that Matthew Abraham took charge of the defendant, then a child, as stated in the plaint.

"2nd. That a considerable sum of money was expended by Matthew Abraham on the Akbarry buildings.

"3rd. The nature and extent of the property left by Matthew Abraham.

"4th. That the defendant, on Matthew Abraham's death, was continued in the management of all his estate, on the terms mentioned in the plaint, and that he took the renewal of the Akbarry Contract for the remaining months of the year in which Matthew Abraham died, and in subsequent years, as stated by them.

"The Defendant to prove—

"1st. That his father died possessed of property, and that Matthew Abraham took possession of it.

"2nd. That the shop was established as stated, and that he and Matthew Abraham raised capital for it by borrowing money jointly for it.

"5th. That on Matthew Abraham's death he (defendant) became the legal head of the family, and as such continued in possession of the estate.

"6th. That he obtained, after Matthew Abraham's death, the Akbarry Contracts for his own exclusive benefit, and that he was legally entitled so to do.

"Each party is at liberty to disprove the points given to the other."

A vast mass of evidence upon the points recorded was adduced, both on the part of the plaintiffs and on the part of the defendant. Their Lordships do not find it necessary to enter into the details of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state the conclusions at which they have arrived as to the result of evidence bearing on these points. By the decree made upon the hearing of the cause by the Civil Court of Bellary, the Court ordered as follows: that an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to Matthew Abraham's death, and that the defendant do pay to the plaintiffs one-half of the capital and profits found due. That an account be taken of all the capital employed in the distillery business and of the profits, down to the time of the death of Matthew Abraham, and also of the profits of the distillery business arisen since his death, and that the defendant do pay to the plaintiffs the amount of the capital and profits found due. That an account be taken of all other the moneys, goods, debts, and property of Matthew Abraham which have been collected or received by, or come into the possession of, the defendant, or any person by his order or for his use, and that the defendant do deliver up to the plaintiffs all such portions thereof as consist in kind or specie, and do pay to the plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of Matthew Abraham. That so long as the present contract endures, and so long as the defendant carries on the business in the plaintiffs' distillery buildings, &c., and with their capital, stock, &c., he must and shall be considered as their agent, and as such accountable to them for all the profits arising from the said business, and that he shall deliver up to the plaintiffs all deeds, books, securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of Matthew Abraham, deceased; the plaintiffs being bound, in taking the aforesaid several accounts, to make to the defendant a just and sufficient allowance for his services in managing the said distillery business and also for his services in collecting and managing all other the property, estate, and effects of the said Matthew Abraham, and that the defendant do pay to the plaintiffs the costs of the suit.

From this decree the defendant appealed to the Sudder Court. The Sudder Court, upon the case being brought before it, submitted a question to their Pundits in these terms:

"Two brothers, governed by Hindoo law, inherit no ancestral property. They live together. The eldest acquires some property. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labor thereto. The elder of these brothers has demised. During the latter years of the deceased brother, the labor fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder,

brother has left two sons. Are the said uncle and nephews to be considered co-sharers ; and, if so, in what proportions ?”

And the Courts afterwards submitted this further question to the same Pundits :

“Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respective rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them ?”

The opinion given by the Pundits upon these questions having been that the property ought to be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons could not be affected by their ignorance of those rights, the Court, as to the legal rights of the parties, held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares ; and having arrived at this conclusion, the Court adopted the estimate of the value of the property made by the plaintiffs for the purpose of their suit—that it was of the value of 3,00,000 Rupees,—added to that amount the sums which had been paid to the plaintiffs and to creditors, and the value of some part of the property in the plaintiff's possession, thus bringing up the entire value of the property to 4,71,114 Rupees 10 annas 5 pie, and taking one-half of that amount as the plaintiff's share, and deducting from it the sums which had been paid to them, and one-half of the debts, found the balance due to the plaintiffs to be the sum of 71,492 Rupees 10 annas 9½ pie, which the Court ordered the defendant to pay to the plaintiff in discharge of all obligations due by him up to the date of the suit. The Court was also of opinion that the plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

It is from this decree of the Sudder Court the present appeal has been brought.

The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question, it is material in the first place to observe what was the real point in issue in the cause. Laying out of consideration the objection raised by the answer, that the plaintiff, Charlotte Abraham, as widow, could not sue jointly with the other plaintiffs, her sons—an objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the Sudder Court when the case was first brought before it by appeal—the true question at issue in this case is not who was the heir of the late Matthew Abraham, but whether he and the respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject, but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the status of an undivided family, is the creature of, and must be governed by the Hindoo law. Considering the case, then, with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity ? He becomes, as their Lordships apprehend, at once severed from the family, regarded by them as an outcast. The tie which bound the family together is, so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition ; it must, as their Lordships think, equally be put an end to by a severance which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as

he has renounced his old religion, or, if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion.

It appears, indeed both from the pleadings, and from the points before referred to, that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to, with a reference also to the usages of this particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point appears also to be supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at Bellary seems to coincide entirely with the opinions of Pundits reported in the 2nd vol., pages 131 and 132, of Macnaghten's "Hindoo Law." It is there stated that on the death of an apostate from the Hindoo faith his heirs, according to Hindoo law, will take all the property which he had at the time of his conversion; and the marginal note states that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulates the devolution of property. The Pundits, therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare, is the separation of the convert from the binding force of Hindoo law, as his subsequent acquisitions.

Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindoo becoming a convert to Christianity. The *lex loci* Act clearly does not apply, the parties having ceased to be Hindoos in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos, and the Mahomedan law to Mahomedans, they must be understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class, which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom, and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point, as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the Sudder Dewanny Adawlut in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the forum, as the Supreme Courts, had. The East Indians could not claim the English law as of right; but they were a class;

most nearly resembling the English ; they conformed to them in religion, manners and customs, and the English law as to the succession of moveables was applied by the Courts in the Mofussil to the succession of the property of this class.

Such, then, being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

Their Lordships collect from the evidence that the class known in India as Native Christians, using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindoo customs and usages as to property ; others retain those customs and usages in a modified form ; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the East Indians ; a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts enjoy in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the respondent descended was of that class of Native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom ; but their Lordships are perfectly satisfied upon the evidence that the late Matthew Abraham and the respondent had no ancestral property, and that the property which the late Matthew Abraham had, was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in India upon this point. They are also quite satisfied upon the evidence, that from the time of the late Matthew Abraham's marriage, he and the appellant Charlotte, his wife, and their children, adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the appellant Charlotte Abraham belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive Matthew Abraham into their society, and treat him as one of themselves. The evidence on this point of the appellant, Charlotte Abraham, the first plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. Matthew Abraham had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of Bellary would recognize her husband as one of their body, and the marriage took place. On one important public occasion, when a jury was summoned of East Indians, Matthew sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed then to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it *ab intestato*, their Lordships entertain no doubt ; but that is not the question on which this case depends. The question is, whether, when there are different laws as to property applying to different classes, parties ought not to be considered to have adopted the law as to property whether in respect of succession *ab intestato* or in other respects, of the class to which they belong. In this particular case the question is, whether the property was bound by the Hindoo law of parcener-ship.

Now Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of their acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, *à fortiori* a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. Melville that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject from conscience, customs to which their first converted ancestors adhered, must the abandoned usages be treated by a sort of *fiction juris* as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so as to things of convenience of interest? Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive *lex fori* imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

The law has not, so far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a change of class is no greater than that which often results from a change of domicile. The *argumentum ab inconvenienti* cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing in law? Their Lordships are of opinion that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a "Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as lightly laid aside. We find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate; it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as father? Not by consent, for there was none; not by force of obligatory law, for there is none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members; by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion that the undivided family on which the defendant relies in his answer did not exist in any sense which is material to or assist the decision of the case.

There being, then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late Matthew Abraham's acquisitions ought, or ought not according to that law, to have been deemed

to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lordships, however, think it right to add, for the guidance of the Courts in India in future cases, that whenever the opinion of Pundits is required, and there are any special circumstances which may bear upon the question to be submitted for their opinion, those special circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference to the broad and general statements contained in the case which, in this instance, was laid before the Pundits; "that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was so acquired—circumstances which, to say the least, were important to be considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late Matthew Abraham, a point which, though not distinctly pleaded on the part of the respondent, must, as their Lordships' think, upon a fair view of all the pleadings in the case, be considered to be open.

In considering the weight of the evidence upon this point, the first thing to be determined is, upon whom does the burthen of proof rest? Their Lordships are of opinion that it lies on the defendant. It must be so even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labor of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor of every observation made and argument urged upon it by either side: that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on either side as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. Machesson to be not a one-sided one; on the contrary, it presents evidence embarrassing to deal with both in the conflict of positive testimony and of opposing presumptions. For the appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters: 1st, the habits of life of the families both of Matthew Abraham and the respondent as inconsistent with the nature of the existence of an undivided Hindoo family, Hindoos by origin, but not Hindoos by religion. 2ndly, the establishment by Matthew Abraham of a business under his sole name; his introduction into it of his brother and Richardson as partners with himself; his formal public notification of that fact to the world by a notice, stating that he had introduced them into his firm; the payment of rent for the shop, both during the continuance of that firm, and by the succeeding firm, which then consisted of himself and his brother only; and the inconsistency of that payment with the joint property in the building and premises. 3rdly, the signatures on several occasions of Francis as agent; his dissatisfaction with the business at Kurnaul; and his language regarding it as inconsistent with a joint ownership and corresponding voice. 4thly, after the death of Matthew Abraham, the inconsistency of the defendant's whole conduct for a time with any notion in his mind that he had a joint legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statement in the respondent's letter to Charles Henry Abraham of the 19th August 1842, in which, giving an account of all the property of Matthew Abraham, he states that it was in the bracketed item or items alone he had a half share, the item or items so bracketed not including the distillery, which is afterwards mentioned as

part of the property of Matthew Abraham ; on the respondent's fears expressed in the same letter of being left to seek his fortune ; on his expression that he had hoped that his brother would have provided for him ; and on the request to Charles to intercede with his mother to carry out the presumed intentions of his father. 5thly, the treatment by the defendant of Mrs. Charlotte Abraham as the head of the family ; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice ; the administration taken out in her name, and his taking a power of attorney from her. These were treated as inconsistent with the respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the defendant and his brother belonged ; the custom of the Christian class within which that family was included ; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property as an undivided one.

The dealings of the defendant in the management of his brother's affairs ; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk ; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family ; the presumed continuance of a state proved to have existed, and not in terms proved to have been interrupted ; the execution of the bonds and conveyances referred to in the respondent's case ; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent,—were pressed with much force on the attention of their Lordships. The statement of ownership in Francis contained in his mortgage deed, and the admissions derived from the acts of the third plaintiff, Daniel Vincent Abraham, in the suits and proceedings relating to the Kurnaul affairs, also referred to in the case of the respondents, were urged as additional grounds in support of the case of the defendant, which it was argued the language of a large portion of the correspondence strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo law. In this point of view much, if not the whole, of what is urged on the part of the respondent as to the nature of the original family to which he and Matthew belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of Matthew Abraham to change, and as to the fact of his having changed the class of Christians to which he was attached. As to the absence of proof that the respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot but weigh heavily against the respondent, it is to be observed that there is an equal absence of proof that the respondent ever received any share of profits as parcener.

The arguments from the dealings of the brothers, so forcibly urged by Sir H. Cairns, are certainly as forcibly to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established and maintained it on the ordinary commercial basis, in shares, as well when they were the only partners as when Richardson was associated with them. On what ground, then, should a Court conclude, if it thought that a conjoint interest existed in the Akbarry Contracts, that it was founded on Hindoo family union, rather than on the model of the shop-business ? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed that these instruments are wholly unexplained by the evidence, and that the fact of the appellant, Charlotte Abraham, having been made a party to some or one of them, renders it very difficult to deduce from any of them the inference for which the respondent has contended ; but what is, perhaps, of still greater importance is this, that there is no proof of the application of any of the moneys raised by these instruments to

any other purposes than the purposes of the shop, and that the respondent by his answer refers to these moneys having been raised for the purposes of the shop-business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After carefully perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th August 1842, to which they have above referred. They find much both in the correspondence and in the other documents in proof in the cause which tends to confirm what is stated in that letter.

The respondent by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the Counsel for the respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the appellant, Daniel Vincent Abraham. Neither the appellant, Charlotte Abraham, nor the late plaintiff, Charles Henry Abraham, is in any way proved to have been privy to or cognizant of this admission; the late plaintiff, Charles Henry Abraham, was absent in England at the time, and he never in any way adopted it. It is, no doubt, evidence against all the plaintiffs, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the Sudder Court. Whence had this young man of nineteen, his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a status concerning which the respondent himself seems to have been long uncertain. Had he so understood his position at the time when he wrote the letter of the 19th of August 1842; had he then considered that he was a half sharer in the whole property, he could scarcely have expressed himself as he did in that letter. Yet to this admission of this youth, ignorant alike of law and business, a binding effect is given against all the plaintiffs on the record.

Their Lordships are not prepared to follow the Sudder Court in the weight which they have given to this admission. Looking at the whole case with reference to the Hindoo law, they are of opinion that the claim of the respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the English law—a point of view, however which, so far as the respondent is concerned, seems to them to be excluded by the pleadings in the cause—the evidence on the part of the respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion that the decree of the Sudder Court cannot be maintained; but, on the other hand, they are not prepared to go to the full length to which the Judge of the Civil Court of Bellary has gone by his decree. The respondent no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the appellant, Charlotte Abraham, by accepting a power of attorney from her. That character, and the acquisitions under it, should have been renounced before the respondent asserted an interest adverse to that of his constituent; such an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of Administration were, indeed, taken out for a especial object only; they were not strictly necessary, a certificate would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to, or subsequently ratified the authority delegated by, the Letters of Administration. The Administration related back to the death of Matthew; the possession

of the whole property, therefore, from the time of his death, must be ascribed to the first plaintiff, as the defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but on the other hand, they entirely agree with the Sudder Dewanny Adawlut in their estimate of the value of the respondent's services. The property in the Abkarry contract may, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the plaintiffs were competent to the management of the concern. In all probability, but for the respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the respondent to be named as the successor to his brother in the contract. The relationship of the respondent to the family, the devotion of his time and labor to the augmentation of its wealth, the creation, as it were, of the profits of the Abkarry business, establish a great difference between this and the case of any ordinary agency.

In ordinary cases and under ordinary circumstances these services on the part of the respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case their Lordships find it proved by the plaintiff's first witness that the respondent on Matthew's death declared to him that he had worked like a slave in the Abkarry business, and was merely paid for his labor; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the respondent, but she never did so. After her having so long availed herself of the respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the respondent to be remunerated to that extent. Their Lordships therefore think that it ought to have been declared by the decree that the respondent was entitled to an equal share of the profits of the Abkarry contract accrued after the death of Matthew as a remuneration for his services in the execution of that contract. Their Lordships think also that, having regard to the evidence to which they have last alluded, and to the respondent having been permitted for so many years to carry on the Abkarry contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs up to the hearing, ought not to have been given against the respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the Sudder Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Sudder Court, and to restore the decree of the Civil Court of Bellary, modified as above pointed out.

The 9th July 1863.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and
Sir J. W. Colville.

Practice of Privy Council in reversing decrees.

On Appeal from the Supreme Court of Judicature at Madras.

Richardson and others, Executors of Ghoolam Moortoozah,

versus

The Government representing the Estate of the Nawab of the Carnatic.

It is not the practice of the Judicial Committee of the Privy Council to disturb the finding of the Court below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents.

THIS case stood over after the appellant's Counsel had been heard, in order that their Lordships might have an opportunity of examining the evidence on which the questions raised by the appeal depend. They have accordingly done so, and having considered it carefully and fully weighed the arguments advanced on the part of the appellant, in the course of which everything that can be found in the record favorable to his case as well connected and arranged, they have come to the conclusion that the appeal cannot be supported.

It is brought against an order of the Supreme Court of Madras disallowing some, whilst it allowed other items of a claim preferred by Ghoolam Moortoozah Khan Bahadoor, the deceased appellant, under the Act passed in 1858 by the then Legislative Council of India, for the administration of the estate and for the payment of the debts of the last Nawab of the Carnatic.

The claim was made under the 14th Section of the Act (No. XXX of 1858). By that and the subsequent Sections it is provided that any person claiming to be a creditor of the late Nawab, who shall file a declaration stating that he is willing to receive in full discharge of all his claims against the Nawab or his estate, such amount as the Supreme Court shall award under the provisions of the Act, shall be entitled to have his claim investigated in a summary way, and to receive the amount awarded out of the assets of the late Nawab, in the hands of the Receiver appointed under this Act, if these shall be sufficient for the purpose; and if they shall be insufficient, out of the Public Treasury. The Court, however, in the exercise of this summary jurisdiction, is (by the 22nd Section) forbidden to allow to any claimant, in respect to money lent or advanced, any larger sum than the amount which shall be proved to have been actually advanced to or for the late Nawab, with simple interest thereon, not exceeding the rate of six per centum per annum; or to any claimant, in respect of goods supplied, or of any other matters, any larger sum than the amount which shall be proved to have been the fair and actual value thereof at the time when the debt was incurred, with simple interest, not exceeding the rate aforesaid, if the Court shall consider the claimant entitled to interest. It would seem, therefore, that the Act not only limits the extraordinary remedy which it gives, to certain defined classes of debt, but throws upon the claimant more than the ordinary burden of proof, compelling the holder of any acknowledgment or security to prove the actual consideration for it; and those claiming the price of goods delivered, to prove the fair and actual value of them.

The late appellant, who was a kinsman of the Nawab, and was always on terms of intimacy with him, appears to have been an extravagant, and, for many years, a needy person. In 1843, he took the step, most unusual, as we understand, for a person of his rank, of passing through the Insolvent Court. In 1851, on the occasion of making a final settlement with his creditors, he was assisted by the issue

by the Nawab, of some securities, known as the Istafa Cutcherry Bonds, to the extent of seven lacs of rupees. These bonds were handed over to creditors of the late appellant; they have been since paid, and are not now in question. It is said on the part of the appellant that they were given in part discharge of a large debt due from the Nawab, but that this payment left other demands still unsatisfied, which are the subject of the present proceedings.

The principal item now in controversy is founded upon moneys said to have been placed by the mother of the late appellant in the hands of the mother of the Nawab, three lacs by way of loan, two lacs by way of deposit in trust for the late note.

For these sums it is not pretended that the Nawab was originally liable, but it is stated that he received them from his mother, and thereby became liable for them, and acknowledged his liability. The debt of seven lacs of rupees was said also to have consisted mainly of moneys advanced in the same way by the mother of the Nawab and secured by his promissory note.

The story told on behalf of the late appellant seems to their Lordships to be full of the grossest improbabilities. It is highly improbable that his mother who appears to have been in the receipt of a small pension only, should have had the means of advancing, as she is alleged to have done, no less than ten lacs of rupees to the mother of the Nawab, especially within the short period within which these sums are alleged to have been advanced. It is equally improbable that these advances, if in fact made by the late appellant's mother, should have been made, as they are alleged to have been, without his knowledge. If these sums were really due it is scarcely to be credited that the claim for them should not have been prosecuted in 1848, when the account was sent in to the Istafa Cutcherry,—an account, it is to be observed, in which written documents now produced are referred to as vouchers for some of the items. Again, it is most improbable that the grandmother of the Nawab should have deposited two lacs of rupees with the Nawab's mother as a provision for the late appellant, and that no communication should for several years have been made to him upon the subject. Yet there is no trustworthy evidence to explain any of these improbabilities, or to support the ingenious theories suggested at the Bar. The promissory note for seven lacs of rupees, part of this alleged advances, is not given to the lady who is said to have made the advances, but to Arathoon, who appears to have been engaged in other pecuniary transactions with the Nawab. No reliance can, in their Lordships' judgment, be placed on the letters alleged to have been written by or by the direction of the Nawab admitting the late appellant's claim, or upon the extracts alleged to have been made from the Nawab's accounts. The letter of the 26th April 1848, in their Lordships' opinion, bears upon the face of it, palpable marks of having been concocted for the mere purpose of sustaining the late appellant's claims, and cannot be relied upon to support them; and if this document be fabricated, the fabrication is all but fatal to the appellant's case. Beyond this it is plain upon the evidence that the Istafa Cutcherry disputed the late appellant's claims. He was called upon for accounts and particulars. He rendered none, and did not prosecute his claims in the life-time of the Nawab. Moreover, the evidence shows that the late appellant for some time at least acted as agent for the Nawab, and was in receipt of moneys on his account, and there is no proof of these moneys having been fully accounted for by him. Their Lordships are satisfied that the Court below was quite right in holding that no sufficient evidence had been offered in support of this charge.

Nor have they been able to satisfy themselves that any of the smaller items which have been disallowed on the second part of the claim, ought to have been allowed. It is unnecessary to consider whether some of the items disallowed, if satisfactorily proved, would have constituted debts recoverable under the 14th Section of the Act, because their Lordships think that they are not proved. It is not the course of this Committee to disturb the finding of the Courts below upon

mere issues of fact, unless it is clearly satisfied that there has been some miscarriage either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination, and of inspecting the original documents. Their Lordships also feel that in the exercise of this statutory and peculiar jurisdiction, the Court below was almost bound to insist on the utmost strictness of proof. For it needs but little knowledge of human nature, as it exists in India, to see that a scheme involving the payment out of the Public Treasury of the debts of a native Prince, who seems to have lived and died in a state of chronic insolvency, was calculated to bring forth a host of claimants not likely to be very scrupulous, either in the statement of their demands, or in the manufacture of evidence to support them. And it is obvious that the Government which has thus undertaken to pay the debts of the Nawab must be without many of the means which an ordinary representative of a deceased person would have of resisting claims, either wholly false or dishonestly swollen.

Upon the whole case their Lordships are unable to see any sufficient ground for disturbing the judgment of the Court below, and they must, therefore, humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 22nd July 1863.

Present :

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colville.

Suicide—English Law of Forfeiture of Personal Property.

On Appeal from the Supreme Court of Judicature at Fort William in Bengal.

Advocate General of Bengal,

versus

Ranee Surnomoyee.

The English law of forfeiture of the personal property of persons committing suicide, if ever applied to Europeans in India, was not applicable to Natives.

Whether the law ever had existence as regards Europeans in India.—*Quære.*

THE question in this case arises on the claim of the Crown to a portion of the personal estate of Rajah Kristonauth Roy Bahadoor, who destroyed himself in Calcutta on the 31st October 1844, and was found by inquisition to have been *felo de se*.

We understand that the Rajah had a residence in Calcutta, though his raj or zemindary was at some distance from that city. He was a Hindoo both by birth and religion.

On the morning of the day on which he destroyed himself he made a will, by which he left a large portion of his property to the East India Company for charitable purposes.

The will was disputed by his widow, who was his heiress, and a suit was instituted by her against the East India Company and others to determine its validity. It was agreed between the litigating parties that the question should be tried by an issue at law. The widow insisted, amongst other objections, that the testator was not in a fit state of mind to make a will at the time of its execution.

The issue was tried, and a verdict was found by the Judges against the will, upon what ground does not distinctly appear, and the verdict was acquiesced in by the Indian Government.

If the Crown, by virtue of the inquisition, was entitled to all the personal property of the Rajah, the validity or invalidity of the will was, as regards his personal estate, of no importance.

Now the inquisition had found that the goods and chattels of the Rajah, when he committed self-murder, amounted within Calcutta to 987,063 rupees, and without the town of Calcutta, to 289,500 rupees; and it stated that all this property was claimed by the widow.

No claim to any part of it appears at that time to have been set up by the East India Company on behalf of the Crown, and very large sums were from time to time, by the order or with the consent of the Indian Government, paid over to the widow in the years 1846 and 1847.

A portion, however, of the Rajah's personal estate, amounting to between 6 and 7 lakhs of rupees, was secured in the Supreme Court, in order to provide for the payment of life annuities to two ladies, both then living. The existence of these charges seems to have been the only reason why this fund was not transferred to the widow, with the rest of the estate.

One of the annuitants is now dead, and the fund reserved to answer her annuity is of course set free. This fund is now claimed by the Indian Government, under the finding on the inquisition of 1844.

It is stated in the affidavit of a gentleman, who was manager for the widow on the death of her husband, that he was advised in 1844 by three English counsels of eminence, whom he names, that the verdict on the inquisition might be set aside on the ground, both of misdirection by the Coroner, and as being against the weight of evidence; but that proceedings were not taken for that purpose, because the Government represented, through its law agents, that no claim would ever be made under the verdict.

If the facts be such as we have stated, it is impossible not to feel some surprise at the present demand; and if we differed from the Court below, it would deserve much consideration whether a claim which seems to have been abandoned in 1844 ought now to be entertained. But these facts do not seem to have been noticed by the Judges in India; there may possibly be circumstances with which we are unacquainted to account for the course taken by the Government, and we think it better to dispose of the case on the merits.

At what time, then, and in what manner did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindoo committing the same act in Calcutta?

The sum of the appellant's argument was this, that the English Criminal Law was applicable to Natives as well as Europeans within Calcutta, at the time when the death of the Rajah took place, and the sovereignty of the English Crown was at that time established; that the English settlers, when they first went out to the East Indies in the reign of Queen Elizabeth, took with them the whole law of England, both civil and criminal, unless so far as it was inapplicable to them in their new condition; that the law of *felo de se* was a part of the criminal law of England which was not inapplicable to them in their new condition, and that it therefore became part of the law of the country.

Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them, not only the laws, but the sovereignty of their own State, and those who live amongst them, and become members of their community, become also partakers of and subject to the same laws.

But this was not the nature of the first settlement made in India; it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly-civilized country, under the Government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

If the settlement had been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which they settled. It is true that in India they retained their own laws for their own Government; within the factories which they were permitted by the ruling powers of India to establish;

but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained by Lord Stowell in a very celebrated and beautiful passage of his judgment in the case of the Indian Chief (3 Rob. 28).

The laws and usages of Eastern countries, where Christianity does not prevail, are so at variance with all the principles, feelings, and habits of European Christians, that they have usually been allowed, by the indulgence or weakness of the Potentates of those countries, to retain the use of their own laws; and their factories have, for many purposes, been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to Natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindoos are suited to Europeans. These principles are too clear to require any authority to support them, but they are recognized in the judgment to which we have above referred.

But if the English law were not applicable to Hindoos on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question, in this case, is whether, by express enactment, the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindoos destroying themselves in Calcutta.

We are referred by Mr. Melville, in his very able argument, to the Charter of Charles II. in 1661 as the first, and, indeed, the only one which in express terms introduces English Law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had or should have factories; and it authorized such Governors and the Council to judge all persons belonging to the said Company, or that should live under them, in all causes, whether civil or criminal, according to the laws of the Kingdom of England, and to execute judgment accordingly.

The English Crown, however, at this time clearly had no jurisdiction over Native subjects of the Mogul, and the Charter was admitted by Mr. Melville (as we understood him) to apply only to the European servants of the Company; at all events, it could have no application to the question now under consideration. The English Law, civil and criminal, has been usually considered to have been made applicable to Natives within the limits of Calcutta in the year 1726, by the Charter 13, Geo. 1. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to Natives not Christians, to Mahomedans, and Hindoos, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty.

To apply the law which punishes the marrying a second wife whilst the first is living to a people amongst whom polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied.

In like manner, the law, which in England most justly punishes as a heinous offence the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years.

Accordingly, in the case referred to in the argument, the law was held not to apply.

Is the law of forfeiture for suicide one which can be considered properly applicable to Hindoos and Mahomedans?

The grounds on which suicide is treated in England as an offence against the law, and punished by forfeiture of the offender's goods and chattels to the King, are stated more fully in the case of *Hales vs. Petit*, in *Plowd. Rep.* 261, than in any other book which we have met with. It is there stated that it is an offence against Nature, against God, and against the King.

Against Nature, because against the instinct of self-preservation; against God, because against the commandment, "Thou shalt not kill," and a *felo de se* kills his own soul; against the King, in that thereby he loses a subject.

Can these considerations extend to Native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced, no allegiance to the King of Great Britain?

The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattles, real and personal, but not to real estates: these distinctions, at least in the sense in which they are understood in England, not being known to or intelligible by Hindoos and Mahomedans.

Self-destruction, though treated by the law of England as murder, and spoken of in the case to which we have referred in *Plowden* as the worst of all murders, is really, as it affects society, and in a moral and religious point of view, of a character very different, not only from all other murders but from all other felonies. These distinctions are pointed out with great force and clearness in the notes attached to the Indian Code, as originally prepared by Lord Macaulay and the other Commissioners. The truth is, that the act is one which in countries not influenced by the doctrines of Christianity, has been regarded as deriving its moral character altogether from the circumstances in which it is committed:—sometimes as blameable, some times as justifiable, sometimes as meritorious, or even an act of positive duty.

In this light suicide seems to have been viewed by the founders of the Hindoo Code, who condemn it in ordinary cases as forbidden by their religion; but in others, as in the well-known instances of *suttee* and self-immolation under the *Car of Juggernaut*, treat it as an act of great religious merit.

We think, therefore, the law under consideration inapplicable to Hindoos; and if it had been introduced by the Charters in question with respect to Europeans, we should think that Hindoos would have been excepted from its operation. But that it was not so introduced appears to us to be shown by the admirable judgment of Sir B. Peacock in this case; and if it were not so introduced, then, as regards Natives, it never had any existence.

It would not necessarily follow that therefore it never had existence as regards Europeans. That question would depend upon this, whether, when the original settlers, under the protection of their own Sovereign, were governed by their own laws, those laws included the one now under consideration; whether an offence of this description was an offence against the King's peace, for which he was entitled to claim forfeiture; whether the factory could for this purpose be considered as within his jurisdiction. In that case it might be that the subsequent appointment of Coroners by the Act of the 33 Geo. III. would render effectual a right previously existing, but for the recovery of which no adequate remedy had been previously provided.

We are not quite sure whether the Court below intended to determine this point or not. Much of the reasoning in the judgment is applicable to Europeans as well as to Natives, but the Chief Justice in his judgment says:—

"At present we have merely to consider the question so far as it relates to the goods and chattles of a native who wilfully and intentionally destroys himself, and who cannot in strictness be called a *felo de se*; and we now proceed to deal with that question, and with that question alone."

The point so decided we think perfectly clear, and it is not necessary to go farther. Since the New Code, which confines the penalty of forfeiture within much narrower limits than existed previously to its enactment, and does not extend it to the property of persons committing suicide, the case can hardly again arise.

We have no doubt that it is our duty in this case humbly to advise Her Majesty to dismiss the appeal, with costs.

The 29th July 1863.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, and Sir L. Peel.

Onus probandi—Inheritance—Legitimacy.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Khajah Mahomed Gour Ali Khan,

versus

Ashruffoonissa and others.

The plaintiffs having to prove not only their relationship (which was not disputed), but their heirship (which depended upon the illegitimacy of the defendant), were held bound to give sufficient general evidence in support of their case, to throw upon the defendant the onus of proving his legitimacy.

It is with great regret that their Lordships in this case find themselves unable to dispose of the case upon the evidence as it stands.

The facts on each side are such that they must, from their very nature, be capable of clear and distinct proof. If Abdool Kadir Khan, *alias* Wuzur Jan, was the miserable object which has been described by the respondents, it must have been a fact known not only to all the members of the family, but to the medical men who attended him, and to all respectable people in the neighbourhood who were in the habit of associating with him. On the other hand, if he was a married man, and contracted a legal marriage with Ala Rukhee Begum, as is alleged, and the son of that marriage lived in the family, and on the death of the father was acknowledged as his heir, that is a fact which must be equally capable of proof. Unfortunately, the witnessess on both sides are of such a character that it is impossible for the Court to place any reliance upon their testimony.

The Judge of the Zillah Court has pronounced in the strongest terms his opinion that the appellant in this case is entitled, and that the case against him is a conspiracy. But, instead of stating the grounds upon which he arrived at the conclusion, he confines himself to alleging that as his opinion, and that he has no doubt about it. He has not afforded to the Court that assistance which it is entitled to expect, and which I believe by the Regulations he is bound to afford. On the other hand, we cannot say that the Sudder Court has proceeded in a manner which is entirely satisfactory. They hardly seem to have allowed sufficient weight to the circumstance that the respondents (who are the plaintiffs) were the party who had to make out the case. They have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the illegitimacy of the appellant; and they must give sufficient general evidence to throw upon him the onus of proving his legitimacy.

Their Lordships, therefore, must advise Her Majesty to remit the case to India. Probably the proper order will be, to affirm the decree of the Sudder Court, so far as it reversed the decree of Zillah Judge; to reverse the Sudder decree in other respects: and to remit the case to the Sudder Court, with directions that they shall

send it back to the Zillah Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of the cause. There will be no costs in this appeal

Khajah Mahomed Gour Ali Khan vs. Kajah Ahmed Khan.

With respect to the decision in the case, it must stand over until the result of the proceedings in the case of "*Khajah Mahomed Gour Ali Khan versus Ashruffoonnissa and others*" is known, the appellant being the same in both cases.

If the appellant should not make out any title in the other case, he will have no interest in this.

The 30th November 1863.

Present :

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colville.

Rule of Succession to a Principality—Judgment in rem and Judgment inter partes (Distinction between)—Hindoo widow (Decree against, binding on Heirs)—Joint Hindoo Family—Onus probandi (Allegation of partition)—Inheritance by widow of separate estate.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Kattama Nauchear,

versus

The Rajah of Shivagunah.

The succession to a zemindary which is admitted to be in the nature of a Principality—impartible and capable of enjoyment by only one member of the family at a time—is governed (in the absence of a special custom of descent) by the general Hindoo Law prevalent in the part of India in which the zemindary is situated, with such qualifications only as flow from the impartible character of the subject.

The succession to such a zemindary may be governed by a particular or customary canon of descent.

A judgment is not a judgment *in rem*, because, in a suit by A for the recovery of an estate from B, it has determined generally concerning the *status* of a particular person or family; it is a judgment *inter partes*.

The same principle which has prevailed in England as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

A decree in a suit brought for a zemindary by a Hindoo widow, binds those claiming the zemindary in succession to her. Unless the decree can be successfully impeached on some special ground, it will be an effectual bar to any new suit by any person claiming in succession to her. For, assuming her to be entitled to the zemindary at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and, until her death, it could not be ascertained who would be entitled to succeed.

A person, admitting that brothers have been joint in estate, and alleging a partition at a particular place and time, must take upon himself the burden of proving that partition.

Notwithstanding the fact that the grantee selected by Government after the escheat of the zemindary was a remote kinsman of the zemindar of the former line, it was held to be the necessary conclusion from the terms of the grant and the circumstances in which it was made that the zemindary was the self-acquired property of the grantee.

The course of succession, according to the Hindoo Law of the South of India, of a zemindary so acquired, where the family was in other respects an undivided family, was held to be that, the husband dying without male issue, his widow inherited.

In the case of property, of which part is the common property of a joint Hindoo family, and part the separate acquisition of a deceased brother, his widow (in default of male issue) succeeds to his separate estate.

There being a community of interest and unity of possession between all the members of a united family having common property, it follows that, upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's life-time, a common interest and common possession.

But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

THE subject of this appeal, and of the long litigation which has preceded it, is the zemindary of Shivagungah in the District of Madura and Presidency of Madras.

The zemindary is said to have been created in the year 1730 by the then Nabob of the Carnatic, in favor of one Shasavarua, on the extinction of whose lineal descendants in 1801 it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabobs of the Carnatic, and was granted by the Madras Government to a person whom we shall distinguish by one of his many names as Gaurivullabha. He had an elder brother named Oya Taver, who predeceased him, dying in 1815. The zemindar himself died on the 19th of July 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named Vadooga Taver; the second had a daughter named Bootaka; the third had two daughters, Kota and Kautama, the present appellant; and the fourth was childless. The three surviving widows were Unga Muttoo Nauchear, Purvata Nauchear, and Mootoo Veray Nauchear. Of these Purvata was *enceinte* at the time of her husband's death, and afterwards gave birth to a daughter named Sowmia. The two others were childless.

Oya Taver, the brother, left three sons, of whom the eldest was named Muttoo Vadooga.

The zemindary is admitted to be in the nature of a Principality,—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence, if the zemindar, at the time of his death, and his nephews, were members of an undivided Hindoo family, and the zemindary, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar, at the time of his death, was separate in estate from his brother's—family, the zemindary ought to have passed to one of his widows, and failing his widows, to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gaurivullabha's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property, and, as such, was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law, the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zemindary was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gaurivullabha, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew Muttoo Vadooga Taver obtained possession of the zemindary. He seems to have set up an instrument which, in the proceedings, is called a will. On the appellant's side this is treated as a forgery, does not now treat the document as a testamentary dis-

position, or as material to his title; and it may, therefore, be dismissed from consideration. Muttoo Vadooga obtained possession with the concurrence of the various members of the family, and of Government and its officers, as is shown by the documents at pp. 62 and 63 of the Appendix. He afterwards obtained from the then three surviving widows the razeenamah or agreement set out at p. 64 of the Appendix. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July 1831; and was then succeeded by his eldest son, Bodhaguru Sawmy Taver.

Soon after this event, began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the *first* beginning with the institution of suit No. 4 of 1832, and ending with the order of the Queen in Council in 1844; the *second* beginning from the date of that order, and ending with the death of the widow, Unga Muttoo, on the 23rd of June 1850; and the *third* being that which covers the proceedings which have been had since Unga Muttoo died.

The suit No. 4 of 1832 was brought by Velli Nauchear, the daughter of Gaurivullabha by his first wife, on behalf of her infant son Muttoo Vadooga. It claimed the zemindary for the infant by virtue of an Arzi said to have been sent to the Collettor by Gaurivullabha in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the zemindary had been granted to Gaurivullabha solely in consequence of his relationship to the former zemindars, and was, therefore, to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from Gaurivullabha. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the zemindary was to be regarded as the self-acquired and separate property of Gaurivullabha, and ought to pass by virtue of the Arzi to the plaintiff.

In 1833, two other suits were instituted against the zemindar in possession. Of these, that distinguished as No. 4 may be left out of consideration, inasmuch as the plaintiff in it rested his title on an alleged adoption by Gaurivullabha, of which he failed to give satisfactory proof. Such a title, if established, would, of course, have been paramount to the claims of either the nephews or the widows.

No. 3 of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by Unga Mootoo, the fifth wife and the elder of the three widows of Gaurivullabha. She set up an adoption, or *quasi* adoption, of Gaurivullabha, by the widow of the last zemindar of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the zemindary made to him by the East India Company; and she insisted that Muttoo Vadooga Taver, on her husband's death, got possession of the zemindary, of which she was the legal heiress, by means of the forged will. The defence to this suit, so far as it related to the title of the zemindar in possession, was substantially the same as that made to the suit No. 4 of 1832; but it also denied the alleged forgery of the will, and insisted on the razeenamah executed by Unga Mootoo and the other widows to Muttoo Vadooga Taver. In her reply, Unga Mootoo did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the zemindary had been acquired by the sole exertions and merits of her husband; and, as an issue of law, that what is acquired by a man, without employment by his patrimony, shall not be inherited by his brothers and co-heirs, but if he dies without male issue, shall descend to his widows, his daughters, and parents, before going to his brothers or remoter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them

a distinct issue, whether Gaurivullabha and his nephews were or were not an undivided Hindoo family, some evidence was given in the suit No. 4 of 1832 to show, that he and his brother were separate in estate. There was an appeal in each of three suits, and these were heard together, and disposed of by the decree of the Sudder Court, which is set out at p. 270 of the Appendix. That decree dismissed No. 4 of 1833 on the ground that the plaintiff had failed to prove his alleged adoption by Gaurivullabha, and it dismissed No. 4 of 1832 on the ground that the succession to the zemindary was governed by the general Hindoo Law, and not by any particular or customary cannon of descent; so that, if descendible as separate estate, it would go to the widows of Gaurivullabha in preference of a grandson by a daughter. In the suit No. 3 of 1832, it decided, *first*, that, as a matter of fact, the zemindary was the self-acquired and separate property of Gaurivullabha: *secondly*, that according to the opinion of the Pundits whom it had consulted, the rule of the succession to the zemindary, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew: *thirdly*, that, upon the whole evidence, the brothers must be taken to have divided their ancestral property: and *lastly*, that the plaintiff Unga Mootoo was entitled to recover the zemindary, not having forfeited her rights by the execution of the razeenamah.

Against this decree, the zemindar, then in possession, appealed to Her Majesty in Council. The order made on that appeal on the 19th of June 1844, was that the decree of the Sudder Court should be reversed, with liberty to the respondent, Unga Mootoo, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that order in the Sudder Dewanny Adawlut. The grounds on which their Lordships who recommended this order proceeded were, as appears from the judgment delivered by Dr. Lushington, that the Sudder Court had miscarried in deciding the question of division which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the respondent ought to be allowed to remedy the omission in a new suit. And their Lordships added that, though they could make no order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of the title to the property would ultimately depend.

On the 20th of August 1845, Unga Mootoo commenced her second suit in *forma pauperis*. In the interim, Bodhaguru Taver had died, and the zemindary had passed to his brother Gaurivullabha, the father of the respondent, and he with a younger brother were the defendants to the new suit. In her plaint, the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of Velu Nachyar, the widow of the last zemindar of the elder line, to make Gaurivullabha, the first of that name whom we have mentioned, her successor, proceeds to allege that with that object she had caused him and his elder brother Oya Taver to make a partition of their ancestral property as early as the year 1792. The plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised; it was only necessary for her to show that her husband had been adapted by Velu Nachyar, and that the zemindary was his self-acquisition. She then proceeds to allege that, on the death of Velu Nachyar, he actually became zemindar until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company he was again put into possession under their grant. She also, in this suit, makes the alternative case that, even if no partition of their ancestral property took place between Gaurivullabha and his brother Oya, she, as the eldest widow, was entitled to the zemindary, as separate acquisition, in preference to that brother's descendants, and pleads the decision in what is called the Sandayar case, to prove that such is the Hindoo Law, and that the opinion given in the former case by the Pundits to the contrary erroneous.

In his answer, the first and principal defendant recapitulated the several facts relied upon by Bodhaguru in the former suit as constituting his title. He insisted that, by the decision of the Privy Council, the contest was narrowed to the issue whether the brothers were undivided in estate or not, and that the plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit (Appendix p. 24) are thus somewhat vaguely stated :—

“The plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the defendant cannot be called upon to establish the negative side by direct proof. But the defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the plaintiff.”

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Zillah Judge, Mr. Baynes, whose decree, dated the 27th of December 1847, is at page 143 of the Appendix. The effect of it was that the only question really open between the parties was that of division or non-division; that the plaintiff had failed to prove the partition between Gaurivullabha and his brother Oya; and that her suit must be dismissed with costs.

Against this decree, and on the 6th of April 1848, Unga Mootoo appealed to the Sudder Court. The defendant Gaurivullabha then died, and his infant son, the present respondent, came in, and on the 5th of November 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of June 1850, Unga Mootoo also died, and with her death ended the second stage of this long litigation. On the death of Unga Mootoo, the Court seems to have issued a notice in the form ordinarily used on abatement of an appeal by the death of the appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where upon the death of a Hindoo widow, the right of action formerly vested in her devolves not upon *her* heirs but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Boothaka Nauchear, the daughter of Gaurivullabha by his second wife, and Kota and the present appellant, his daughters by his third wife. They claimed as the rightful heirs of the zemindary, if it passed as separate property, next in succession to the widow Unga Mootoo; but considering its impartible nature they expressed their willingness that it should be enjoyed first by Boothaka for her life, next by Kota for her life, and lastly by the appellant. They treated Sowmia, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bodhaguru, and of her being then a childless widow.

Sowmia, however, came forward by a separate petition, claiming to be heiress both to Unga Mootoo and the zemindary, by virtue of an instrument alleged to have been executed by Unga Mootoo in her life-time.

A third claimant was Muttoo Vadooga, the plaintiff in the dismissed suit of 1832. His contention was that, though the decree in that suit may have been right in preferring to his claim that of Unga Mootoo, his title as grandson was nevertheless preferable to that of daughters, and that, on the death of the widow, he became entitled to the zemindary.

Counter-petitions were filed on behalf of the respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Unga Mootoo.

The Sudder Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders :—

By the first, dated 21st October 1850 (Appendix 1, p. 290,) it held that none of the claimants could prosecute the appeal, which is directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April 1851.

They all petitioned for a review of this order : counter-petitions were filed on behalf of the respondent ; and the Court, by its order of the 1st of May 1851, notwithstanding an adverse opinion given by the Pundits of the 7th of March preceding, reversed its former order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental appellants ; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the defendant should be tried.

On the 19th of April 1852, the Court, apparently of its own mere motion on taking up the record of the appeal, reversed this order of the 1st of May 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the respondent shifted his ground, and by a petition dated the 30th of June 1852, objected to the last order and prayed for a review of it. His contention then was that the heirs next in succession to Unga Mootoo, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September 1852, adhered to its order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gaurivullabha who joined in the first of the above-mentioned applications to the Sudder Court, the appellant alone brought a fresh suit. The plaint was not filed until the 5th of December 1856 ; but there seem to have been various intermediate proceedings before both the Zillah and Sudder Courts. These are referred to in the appellant's petition of appeal at page 260 of the Appendix, line 51, but are nowhere stated in detail. Her plaint stated that her father and his brother Oya Taver were divided in state prior to 1801, and were then living separately ; that the zemindary was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The appellant's title in succession to Unga Mootoo is thus stated :—"The zemindary, which is the self-acquisition of the plaintiff's father after his division "with Oya Taver, belongs, on the death of his widow, Unga Mootoo, to his second daughter the plaintiff, who has male and female issue : whilst his first daughter Boothaka has no issue, and the third daughter Sowmia is a widow." In the seventh paragraph (Appendix, p. 251), (though the point is not taken so distinctly as in the suit of Unga Mootoo) she claims the zemindary as her father's self-acquisition irrespectively of the alleged partition with his brother, and question of division.

The answer took a formal objection to the suit, *viz.*, that it was brought against the guardian of the infant zemindar, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 17th of December 1847, as bars to the appellant's claim. It further impeached her title as the heir next in succession to Unga Mootoo in that line of succession, alleging that there were descendants of Gaurivullabha through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845, as constituting the title of the infant zemindar. The estate being then in the custody of the Court of Wards, the Collector was made a defendant, and put in a similar answer. Replies and rejoinders were filed ; but without settling any issues or taking any evidence in the cause, the Zillah Judge, (Mr. Cotton,) on the 25th of

August 1859, dismissed the suit together with the suit No. 4 of 1857, which had been instituted by Sowmia, but with which we have no concern. His reasons for dismissing the appellant's suit were:—*first*, that, upon the question of division, she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and *secondly*, that it was clear upon the opinions of the Pundits, that the zemindary, whether self-acquired or not, could not descend to the widow, nor *a fortiori* to a daughter, except in the event of the zemindar having been of a divided family.

The appellant appealed from this decision to the Sudder Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree dated the 5th of November 1859. The Sudder Court seems also to have considered that, by the dropping of the appeal on Unga Mootoo's death, the decree of 1847 had become final, and, as such, was an effectual bar to the appellant's claim. On the third of March 1860, the Sudder Court refused to give the appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of the Committee.

The present appeal is against the decree of the Sudder Court of the 5th of November 1859, and its order of the 3rd of March 1860, and the decree of the 25th of August 1859. It is also against the order of the Sudder Court of 1852, and the decree of the Civil Court of Madura of the 27th of December 1847. If, therefore, the latter decree is, in truth, a bar to the appellant's obtaining effectual relief in her original suit, the appeal seeks, by re-opening that decree, to remove the bar.

And here, before going farther, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was pronounced by the Zillah Judge when dismissing the suit of 1856; because, if unnoticed here, as it seems to have been unnoticed by the Sudder Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because, in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes*; and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, it was binding on the appellant.

Their Lordships also feel constrained to observe that the various proceedings which have taken place since Unga Mootoo's death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by anything approaching to a regular course of trial and adjudication. When Unga Mootoo died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who, in the event of her title being a good one, would succeed to the zemindary, or it was not. Those persons were obviously not her heirs, but the next heirs of her husband according to the canon of Hindoo Law, which defines the succession to separate estate. It ought not, their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The Sudder Court, however, after making two other and inconsistent orders, referred the parties to an original suit; and yet a suit of that nature, when brought by the appellant, has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the appellant is herself solely responsible; that the suit which she ought to have brought, and which the

Sudder Court intended her to bring, was one in the nature of a bill of revivor, or a bill of revivor and supplement, limited to the object of obtaining from the Zillah Court a declaration that she had established her title to stand in the place of Unga Mootoo, and carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced,) their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sudder Court had in its contemplation when it made its order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal,—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure order of the 16th of September 1852 (Appendix, p. 248) is hardly inconsistent with this, though it seems to contemplate that the decree of 1847 might prove an effectual bar to the suit which the Court itself had directed. Yet, if there was ground for this apprehension, in what a position had the Sudder Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the Sudder Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest order of the Sudder Court which is appealed against, *viz.*, that of the 16th of April 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Unga Mootoo's life-time, would have bound those claiming the zemindary in succession to her. And their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special grounds—it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Unga Mootoo. For, assuming her to be entitled to the zemindary at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and, until her death, it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the respondent that this Committee can do no more than remand the cause, with directions to the Sudder Court to hear and determine the appeal against the decree of 1847; that it cannot itself deal with the merits of a decree of a Zillah Court, until they have been determined by the Appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the Sudder Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to

make the order which the Sudder Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the appellant and the respondent is, as it was, between Unga Mootoo and the respondent's predecessors, whether the zemindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

1. Were Gaurivullabha and his brother undivided in estate, or had a partition taken place between them?

2. If they were undivided, was the zemindary the self-acquired and separate property of Gaurivullabha? And if so—

3. What is the course of succession according to the Hindoo Law of the south of India of such an acquisition, where the family is in other respects an undivided family?

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the decree of 1847. There are undoubtedly strong reasons for concluding that Gaurivullabha and his brother, after the acquisition by the former of the zemindary, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately-enjoyed zemindary. And Unga Mootoo, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burthen of proving that partition; a burthen from which, it must be admitted, she has not satisfactorily relieved herself. Nor can their Lordships, in considering this question, be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made: and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zemindary as the self-acquired property of Gaurivullabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindoo Law" by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Pundits and upon authorities referred to by them. We shall presently examine those opinions and authorities; but, before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs questions of inheritance in these parts of India is to be found in the Mitacshará, and in Chapter 2, Section 1 of that work the right of widows to inherit in default of female issue is fully considered and discussed.

The Mitacshará purports to be a commentary upon the earlier institutes of Yaynawulkya; and the Section in question begins by citing a text from that work, which affirms in general terms the right of the widow to inherit on the failure of male issue. But when the author of the Mitacshará refers to various authorities which are apparently in conflict with the doctrines of Yaynawulkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no

male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed, that the text is propounded as a qualification of the larger and more general proposition in favor of widows: and, consequently, that, in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole Chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that, because widows take the whole estates of their husbands when they have been separated from and not subsequently re-united with their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo Law is not disputed. It is admitted that, according to that Law, such property descends to widows in default of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in Macnaghten's "*Hindoo Law*," title "*Partition*," vol. I., page 53, where it is said as follows:—"According to the more correct opinion, whether there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words, if, at a general partition, any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that, on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that, if the acquirer leaves male issue, it will descend as separate property to that issue down to the third generation. Although, therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequence; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that, according to the Hindoo Law, there need not be unity of heirship.

But to look more closely into the Hindoo Law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should

not the same rule apply to property which, from its first acquisition, has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindoo Law," that, where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindoo Law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange, 135). But some ancient authorities also invoke the other principle. Vrihaspati (3 Dig. 458, tit. cccxcix; see also Sir William Jones' paper cited 2 Strange, 250) says: "Of him whose wife is not deceased, half the body survives; how should another take the property, while half the body of the owner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that, upon the principle of survivorship, the right of the co-parceners in an undivided estate should override the widow's right of succession, whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principle of survivorship that the qualification of the widow's right established by the Mitacshará, whatever be its extent, must be taken to depend. If this be so, we can hardly in a doubtful case, and in the absence of positive authority, extend the rule beyond the reasons for it. According to the principles of Hindoo Law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family; and upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's life-time, a common interest and a common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the preference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected, that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe that the view which we have thus indicated of the Hindoo Law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindoo being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first objection without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the Zillah Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of October in that year, and is at pages 311 and 312 of the Appendix. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pundits in answer to references directed by the Sudder Court before making the decree of the 17th of April 1837. The answers are dated the 28th of December 1836, and the 16th of January 1837, and are at pages 141 and 272 of the Appendix.

On examining the reasons on which the Pundits rest their opinions, it is to be observed that they precede upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitacshará to which they refer; but they leave untouched the question which they ought to have considered, whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitacshará, and what we shall presently say as to the passages from Vrihaspati, is, we think, a sufficient answer to this part of the reasons on which the Pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last agreement seems to be founded on the passages in the Mitacshará contained in Clauses 2 and 3 of Section 1 Chapter 1; and these passages, when examined, clearly appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pundits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pundits rely in support of their opinions. They consist of text from the Mitacshará to which we have already so frequently referred, and passages from Vrihaspati and several other commentators on the Hindoo Law. We have already intimated our opinion that the text from the Mitacshará does not apply to this case, and as to the passages from the commentators they are all of equivocal import. They may or may not have been intended to apply to a case like the present; and if there was nothing more to be found upon the subject they might or might not be thought sufficient to warrant the opinion which the Pundits have founded upon them. But these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the Mitacshará, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Nareda. These authorities failed when contrasted with conflicting passages in the works of other commentators, of which the Pundits in the case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favor of the opinion which they have formed that the widows are not, in this case, entitled to the separately acquired property. It seems to us, too, that decision in the Sandayar case—a decision also founded on the opinion of the Pundits of the Sudder Court—is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion that the zemindary became the separate property of the uncle by the transaction between him and his nephew, is quite unnecessary to consider. All that

is important to be considered is, that, holding the zemindary to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the Sandayar case, by assuming that the Pundits in that case proceeded upon an idea that the defendants of the common ancestor had been separated ; but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinions of the Pundits in this case, which seem never to have been acted upon by any *final* decree. On the other hand, we have the decision in the Sandayar case, and the other authorities cited for the appellants at the bar, particularly the passage from Menu, in Sir William Jones' paper, given at 2 Strange, page 250, and the opinion of the Pundit Kistnamachary (2 Strange, p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordship cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favor of the appellant's contention.

We proceed, then to consider how the Sudder Court ought to have dealt with this case after Unga Mootoo's death ; and we are of opinion that the Court ought, upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion that Showmia and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismissed. The claims of the appellant and her two sisters were founded on a right common to them as against the respondent ; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits ; and upon the merits we are of opinion, for the reasons above given, that the appellant and her sisters were well entitled to the zemindary as against the respondent. We have, of course, not failed to consider the judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindoo Law of Inheritance, Mr. Strange, one of the Judges of the Sudder Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not fully discussed and examined in 1844 as it has been on the present hearing ; and, at all events, we do not feel ourselves justified in holding the appellant bound by the opinion which was then expressed ; which, though, of course, entitled to the greatest possible respect, was not necessary to the decision then arrived at. And as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pundits, and the proceedings of the Courts, which we have not been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it ; but as the case stands upon the authorities, we feel bound to give effect to the conclusion at which we have arrived.

We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal ; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sudder Court, ought to have been and ought to be dismissed ; and in the suit of 1845 to declare that Sowmia and Muttoo Vadooga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal, and to recover the zemindary—this declaration to be without prejudice to

the rights of the appellant and her sisters *inter se* ; and, further, to declare that an account ought to have been and ought to be directed of the rents and profits of the zemindary received by the respondents, or by his order, or for his use, since the death of Unga Mootoo, with directions for payment to the parties entitled of what should be found due upon the account ; and also to declare that the zemindary ought, at once, to be put into the hands of the Collector, or of a receiver to be appointed by the Court, with liberty to the appellant and her sisters, or any of them, to apply to the Court as they may be advised. We shall further recommend that the case be remitted to the Sudder Court, with directions to carry these declarations into effect ; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the appellant has been subjected must be refunded.

The 1st December 1863.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colville.

Mortgage—Equity of Redemption—Foreclosure—Account.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Mohun Loll Sookool,

versus

Goluck Chunder Dutt and others.

* Suit for redemption of mortgage. The Zillah Courts declared the mortgagors (appellant) entitled to redemption, the mortgagees in possession (respondents) having fully paid themselves by receipt of rents and profits. On special appeal the Sudder Court reserved the Zillah decisions on the ground that certain proceedings taken by the mortgagees with a view to foreclosure had effectually barred the equity of redemption. HELD, by the Privy Council, that the Sudder Court ought not to have decided the case on the question of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of first instance where alone evidence could be taken ; that the Court was wrong in treating the proceedings as an effectual bar to the appellant's right of redemption ; and that the question of foreclosure ought, therefore, to be further fully tried upon an issue to be regularly settled.

The Zillah Courts, in coming to a conclusion as to the state of the mortgage accounts, having proceeded not upon proof of the actual collections which were or ought to have been made by the mortgagees, but upon materials which were in a great measure speculative and conjectural, their decision was set aside.

THIS appeal arises on a litigation which commenced, at the latest, in the year 1852, but in a sense earlier, on the questions whether a mortgage continued subject to redemption ; and if it did, what, if anything, was due upon it : a litigation that might, and ought to have been less complex, less prolix, and less tedious, than it has unhappily been. That there was a mortgage is plain ; it may be taken also as equally plain that if it is redeemable, the present appellants (for it may be considered that there are two appellants) are the persons entitled to redeem, and that the respondents are the actual mortgagees in possession, who, if the mortgage is redeemable, are liable to be redeemed.

By two decrees, dated respectively December 31, 1855, and December 9, 1857, mentioned particularly in the appellant's case and the Appendix (the latter being made on the appeal of the mortgages from the former), the mortgagors (the appellants) were not only declared entitled to redeem the mortgage, but were also declared entitled to do so without making any payment ; and this on the ground that, as then decided, the mortgagees in possession had fully paid themselves by receipt of rents and profits.

These Zillah decisions, the mortgagee having been dissatisfied with them, led to a special appeal on their part to the Sudder Dewanny Adawlut at Calcutta, which in 1859 reversed them, upon the ground (which was in fact the only question before the Court on the special appeal) that certain proceedings taken by the

mortgagees with a view to foreclosure had effectually barred the equity of redemption, and, consequently, that the appellant's suits ought to be dismissed with costs.

That led to the present appeal, in which the appellants contend for the relief given to them by the decrees of 1855 and 1857, or at least for something less disadvantageous to them than the decree of 1859.

Upon the materials before their Lordships, their opinion is not in favour of the decrees of 1855 and 1857, or either of them, nor is it in favour of the decree of 1859. They conceive that the materials before the Court which pronounced the decree of 1855, or before the Court which pronounced the decree of 1857, were not, nor are sufficient, as to the matter of debt, to support either of those two decrees, and that on the other hand, the Court which pronounced the decree of 1859 was not, by the state of things then before it, enabled to make that decree.

Their Lordships consider that it did not appear sufficiently before the Court in 1855, or before the Court in 1857, that on the assumption of the redeemable condition of the mortgage, there was not anything then due to the mortgagees on their security.

The Zillah Courts, in coming to this conclusion as to the state of the accounts, seem to have proceeded not upon proof of the actual collections which were or ought to have been made by the mortgagees, but upon materials which were in a great measure speculative and conjectural. And this objection to the mode of taking the accounts has in fact been taken by the appellants' Counsel at their Lordships' bar, when contending against the applications by the Sudder Court of the account so taken to the question of foreclosure.

The other objections taken to the decree of 1859 are, *first*, that the Sudder Court ought not to have decided the cause on the question, of foreclosure, because that question, though raised upon the pleadings, had not been made one of the issues settled in the Court of first instance, where alone evidence could be taken; and, *secondly*, that the Court came to an erroneous conclusion in treating the proceedings of which there was any evidence as an effectual bar to the appellant's right of redemption. Their Lordships consider both these objections to be well founded. It is clear that there have been no such trial of the question of foreclosure as the Regulation which prescribes the statement of formal issues, and indeed substantial justice, require. And in dealing with this question the Sudder Court seems to have directed its attention to the erroneous reasons assigned by the Zillah Judge for holding that no right of foreclosure existed, rather than to the effect of the proceedings proved.

In September 1850, when they filed their notice of foreclosure, the mortgagees not only had notice that the interest of the original mortgagor had been taken in execution, but were actively disputing in a summary suit the right of the decree-holder to put up that interest for sale. There had been a decision against their objections, and their appeal against that decision was pending. The appeal was decided against them on the 8th of January, and the equity of redemption was sold to the appellants on the 7th of April, 1851. It is quite clear upon the authorities that, if the sale had taken place before the notice of foreclosure was filed, that notice to be effectual, must have been served on the purchaser; and in the circumstances above stated, their Lordships conceive that it ought to have been served upon the decree-holder. Yet there is no evidence of any attempt to serve it upon any one except the widow and heiress of the original mortgagor.

Their Lordships therefore think that the question of foreclosure ought to be further and fully tried upon an issue to be regularly settled; and that the mortgage account, whether as incidental to the question of foreclosure, or to the question of redemption, ought to be properly taken. They desire, however, to leave undisturbed the findings of the Zillah Courts upon the title of the appellants to sue the representatives of the mortgagor, and upon the extent and nature of the lands which are the subject of litigation.

Their Lordships are of opinion that each of the three decrees of 1855, 1857, and 1859 should be discharged, and that the cause should be remitted to India, and that the High Court at Calcutta, or, under its direction, the proper Zillah Court, should enquire whether the appellant's right or equity of redemption as concerning the mortgaged estates in question, or any and what part of them, has become foreclosed or barred; and if it has not become so as to the whole of the estates, then to take an account of what, if anything, is due to the respondents, or any of them on the security, and for that purpose to take the usual accounts as to rents and profits and disbursements, with just allowances, and upon the result of that account to deal with the matters in dispute accordingly. The parties respectively to be at liberty to adduce evidence, in addition to that now before us, upon these issues, upon the determination of which the final decision of the cause must depend. The cost of the trial, including those of this appeal, to abide the event.

The 4th February 1864.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Resumption—Re-assessment—Ghatwallée lands in the zemindary of Khurruckpore—Mesne profits—Special Commissioners under Regulation III, 1828.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Rajah, Leelanund Singh,

versus

The Government of Bengal.

IN 1855 the Privy Council decided against the right of the Bengal Government to resume and re-assess the Ghatwallée lands in the Zemindary of Khurruckpore. In 1860 the Sudder Court, acting as Special Commissioners under Regulation III, 1828, at the instance of the Zemindar, directed the release of the resumed lands, but did not decide as to the right to the mesne profits which the Government had received from the Ghatwals during the period of resumption, deeming this question beyond their competency as Special Commissioners. The zemindar having appealed to the Privy Council complaining of the omission, and contending that the mesne profits should have been wholly adjudged to him. Held, that the Special Commissioners had jurisdiction to decide upon the true title to the whole money in dispute, and to direct the payment and disposition of the same with interest.

THE appeal in this case is by the Zemindar of Khurruckpore, from a portion of a decree pronounced in the year 1860 by three Judges of the Court of Sudder Dewanny Adawlut at Calcutta, acting as Special Commissioners under a Regulation of 1828. The Government of Bengal, the only party besides that has (whether both or either of the other respondents, or nominal respondents, could or could not have) appeared here is content with the decree, has submitted to it, and desires to support it as it stands.

The matter arose thus. Some years before the year 1855, the Government of Bengal claimed a right to resume or re-assess lands of considerable extent and value within the Zemindary of Khurruckpore in the possession of various Ghatwals, who held them by Ghatwallé tenure under the zemindar. The claim was enforced by the Government, though opposed on the part of the zemindar, and for some time at least on the part of some, if not all, of the Ghatwals. There was a great and complicated mass of litigation upon the subject before various tribunals, with various success; sometimes one party gaining a decision, sometimes another. The suits were numerous. At last the zemindar brought one of them by appeal before Her Majesty in Council, and upon the appeal the Judicial Committee in 1855 decided against the Bengal Government on grounds fatal in principle to its entire claim of resumption and re-assessment as to all the Ghatwallée lands. That decision was in the same year sanctioned by Her Majesty. The case, with the judgment delivered here by Lord Kingsdown on the part of the Judicial Committee,

is reported in Mr. Moore's 6th volume of "Reports of Indian Appeals," a report to which their Lordships refer, and which has, during the argument on the present appeal, been cited more than once. This decision the Bengal Government or the Special Commissioners determined very properly to consider binding as to all the Ghatwallee lands that had been resumed or re-assessed, and the invalidity of the resumption and re-assessment from the beginning, may be treated as now established. But there remained a material question—the question as to the right to recover from the Bengal Government the large sums which as rents or profits, they had wrongfully or erroneously, by means of the invalid resumption or re-assessment, obtained from the Ghatwals. The Government had latterly not disputed, nor does dispute, its liability to make good this amount with interest to some person or persons, but for some years has, in consequence of the decision of 1855, considered itself as owing the amount with interest to or holding it for some person or persons. After the judgment of 1855 the zemindar instituted or continued a proceeding before the Judges of the Sudder Dewanny Adawlut, as Special Commissioners, for the purpose of obtaining the benefit of that judgment and payment of the principal and interest of the sums which in respect of the lands or part of the lands the Government had wrongfully or erroneously received. This proceeding was brought to a hearing in 1860, and upon it the Judges made the decree now under partial appeal as already stated. The material portion of it is as follows :—

The Government Pleader argues that it is nowhere contended that these lands when resumed were not in the possession of the Ghatwals, who paid, in some instances, a small quit-rent to the zemindar, and in others nothing at all; but they were bound in either case to render certain public services, as the condition of holding their tenures. That as the services of the Ghatwals were excused during the resumption of their lands, they might, with some reason, claim a refund of the past collections on the release of the lands minus the value of the services they would have performed if no resumption had taken place; that the landlord cannot, however, under any circumstances, be entitled to this refund; that, moreover, the Ghatwals themselves have raised no claim for refund, and are not represented before the Court; and as the zemindar has paid nothing, he has no right to demand the wassilat.

It appears to us that under the circumstances thus disclosed in the statements of the parties before us, the applications for a review of the several judgments passed by this Court, as Special Commissioner at different times in the eighty-three cases now under consideration, should be granted; and as the only point for determination is the applicability of the decision passed by the Privy Council on the 13th August, 1855, in Case No. 2045, to the cases now before us, and that point is conceded by the Government, who has also intimated to us, through the Government Pleader, that out of difference to the decision of that High Court of Appeal the lands have been already restored to the Ghatwals, it seems to us unnecessary to postpone judgment in these cases. On the authority, then, of the Privy Council decree, and for the reasons set forth therein, we reverse the decision passed in the several cases brought up for revision before us, and direct that the resumed lands be released from assessment.

As to the wassilat which has been taken by the Government from the parties in possession if the contest before us was confined to the simple question whether the Government was liable or not to the zemindar for the amount, we should have no hesitation in declaring that as the Government officers are held to have had no valid ground for the proceedings under which they resumed and assessed the lands, dispensing with the services previously rendered by the Ghatwals, and not showing that any expenditure was made for the employment of others in their place and vocation, so they cannot be allowed to appropriate these collections for the benefit of the State, on the grounds and assignments set up by the Government Pleader in this case. But the contest is not confined to this question, but involves the rights of the applicant and others, the Ghatwals, not now before the Court, whose rights are altogether denied by the zemindar to receive the refund. Now, *prima facie*, the right to receive the sums collected, with deductions for quit-rent due to the zemindar, is with the Ghatwals, and not with the applicant before us. But, be that as it may, it is not within the competency of this Court, acting as Special Commissioners, under Regulation III. of 1828, summarily to determine a question of disputed private of this nature, the more especially when one of the parties interested has not appeared before us, and is probably ignorant that such a question would be mooted in these proceedings. Such questions must be left to be decided by the regular Civil Courts of the country. It is only necessary to add, that as the resumption proceedings have been determined to be contrary to law, we award to the zemindar the entire costs of these proceedings in the Resumption Courts, with interest thereon, from the date on which he filed his application for review of their judgment.

Copy of this order to be filed in the other eighty two cases, to which it equally applies.

The Zemindar complains here of the omission to decide as to the right to the fund which, as has already been mentioned, the Government did not then, and does not now, claim to retain for its own use, and contends that it ought to have been wholly adjudged to him. The Bengal Government, on the contrary, supports the title or alleged title of the Ghatwals, or their representatives, to receive back the money which was unduly, or in an improper manner, taken from them. To this appeal one Ghatwal and a purchaser from him have been added, at least nominally as parties, respondents. Neither of them, however, has appeared here, nor are their Lordships convinced that without the consent of the Zemindar, either of them would have been allowed to appear as a respondent on this appeal.

Part of the fund claimed was during a period of temporary success on the zemindar's part against the Government, paid to the zemindar under an express liability to pay it back if there should be a subsequent decision against him, as there was, and he paid it back, and with regard to this portion of the fund claimed, it has been, in an especial manner, strongly urged for him that it ought clearly to be now restored to him, whatever may be done as to the rest. Their Lordships, however, considering the circumstances in which the amount received by him came to his hands and left them again, are of opinion that both portions of the fund ought to be dealt with on one and the same principle. Their Lordships are also of opinion that the Judges who pronounced the decision now under appeal, though acting as Special Commissioners, had from the nature of the subject, jurisdiction to direct payment of the whole money in dispute, with interest, to the person or persons entitled; that jurisdiction, their admitted power of deciding as to the correctness or incorrectness of the resumption appears to us to have included. The Judges, therefore, who made the decree of 1860, should, in their Lordships' view of the matter, have not been silent as to the title to the money, but have declared and acted on it, if able, from the materials and parties before them to do so, or if not so able, have directed an enquiry to ascertain the person or persons entitled. Now the Ghatwals were not represented, or were imperfectly represented, before the Court, when the decree of 1860 was made, and their Lordships from the materials before them are not satisfied that a portion at least of the fund does not belong to the Ghatwals from whom it was received, or their representatives. In using these expressions their Lordships treat the controversy as extending to all the sums received by the Government, under the resumption or re-assessment, though their conclusion would be substantially the same if it were treated as confined to the fund strictly subject specifically to the particular proceeding in which the Order of 1855 or the decree of 1860 was made. That a portion of the fund belongs to the Zemindar their Lordships think highly probable, if on account only of his quit-rent or quit-rents fallen into arrear, but possibly also he may have a just claim on more than this portion, or even the whole fund, in respect of services which the Ghatwals were, or had been, under an obligation to perform and have, from, any cause whatever not performed. Subject to that deduction, or those deductions, as the case may be, in favor of the zemindar, there appears to their Lordships a title fit to be considered to the whole fund in the Ghatwals who were in the actual enjoyment of the lands, or their representatives. But their Lordships are of opinion that they have not, and that in 1860 the Judges of the Sudder Dewanny Adawlut (the Special Commissioners) had not before them sufficient materials to enable them to direct safely, or without hazard to justice, the payment, apportionment, or distribution of the fund or any part of it, and that accordingly the decree of 1860 should be added to, and that it should be declared that the Special Commissioners, the Judges of the Court of Sudder Dewanny Adawlut, had and have jurisdiction to decide upon the true title to the funds in question upon this appeal, and to direct the payment and disposition of those funds, with interest accordingly; but that at the hearing on which the decree under appeal was made, it did not sufficiently appear who was or were the person

or persons justly entitled to the money, and that an enquiry ought to have been directed by the Court on that subject; and that with this declaration the cause should be remitted to India, in order to be further dealt with by the Special Commissioners on that footing. We conceive that the Government ought to pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

The 4th February 1864.

Præsent :

Lord Chelmsford, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Adoption—Evidence.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Ramalinga Pillai,

versus

Sudasiva Pillai.

Objection that the respondent's adoption was not valid, because made when the adopter was under pollution in consequence of the death of a relative. Upon a conflict of evidence as to the time of the relative's death, the Privy Council decided in favor of the respondent.

The period of pollution, according to Hindoo law, is 16 days.

Where there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced.

THIS is an appeal from a decree of the Sudder Court of Madras, affirming a decree of the Civil Court of Cuddalore, by which the respondent was declared to be entitled, as the adopted son of Shanmooga Pillai, to a moiety of certain family property, both real and personal. The only question urged before us has been, whether there was a valid adoption of the respondent. The Counsel for the appellant, not only questioned the fact of the adoption, but also contended that no legal adoption could have taken place, as, at the time, it is alleged to have occurred, Shanmooga Pillai was under pollution, in consequence of the recent death of a relative, Sini-vassa Pillai. And they also alleged that the adoption was illegal, as the respondent was the adopter's sister's son: but upon this latter objection very little was said. Upon the fact of adoption, it appears from the evidence that Shanmooga Pillai having been attacked with cholera at Neyvasal, where he had gone a few days previously, the parents of the respondent, hearing of the illness, took the respondent, then an infant of a year and a half old, to Neyvasal, where, on the day previous to the death of Shanmooga Pillai, certain ceremonies were proved to have taken place, which were sufficient to constitute an actual adoption. Several witnesses, whose testimony is not directly impeached, deposed to these facts; but it was urged in argument that many other persons were present on the occasion who ought to have been produced on the part of the respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced. There is not only no impeachment of the credit of the witnesses who speak to the fact of the adoption, but the circumstances under which they allege it to have taken place are highly probable. It appears that there had been some promise made by the parents of the respondent that they would give their son to Shanmooga Pillai for adoption, and nothing is more natural than that, hearing of the illness of Shanmooga Pillai, they should have taken the infant to him, in order to secure the adoption which had been previously proposed. There can be no fair ground, therefore, for discrediting the witnesses who prove the actual adoption.

But the appellant's Counsel contended that, assuming the fact of an adoption of the respondent, it could have no validity on account of his being the son of a sister of Shanmooga Pillai, and also because Shanmooga Pillai was under pollution, in consequence of the death of his relative, Sini-vassa Pillai. It appears that the period

of pollution, according to Hindoo law and custom, is sixteen days, and proof was given that the death of Sinivasa Pillai took place a month before the act of adoption, of the respondent. The appellant, on the other hand, proved by several witnesses that Sinivasa Pillai died only six or seven days before Shanmooga Pillai, and he produced to the same effect a copy of a leaf from a book kept by the Brahmins for recording the time of the deaths of persons for whom annual ceremonies were to be performed. There was thus a conflict of evidence as to the time of Sinivasa Pillai's death, and it was for the Courts below to determine upon which set of witnesses they could best rely. There are, however, certain documents produced in evidence, which, if genuine, would appear to leave little doubt upon which side the balance ought to incline. These consisted of three depositions, made by the appellant's father upon the occasion of his becoming surety for persons appointed on the office of Sheristadar, in all of which, in answer to enquiries directed to ascertain the value and other particulars relating to the lands offered as security, he stated that "the respondent was the adopted son of the deceased Shanmooga Pillai, and that there were no other co-parceners." The appellant's father, however, upon being called as a witness by the plaintiff (the respondent), and these documents being shown to him, swore that the signatures to them were not his, and upon looking into the deposition themselves, said as to each that "as the deposition stated about adoption, it was not made by him." The learned Counsel for the appellant disputed the genuineness of the documents on another ground. In the course of the proceedings in the Courts in India, alleged copies of these documents were put in evidence, which, though substantially agreeing with the supposed originals, yet varied in certain particulars as to the signatures and as to the names and number of the witnesses.

It should be observed that these discrepancies between the copies and the originals, which at present are inexplicable, were not pointed out to the Courts in India, where possibly a satisfactory explanation might have been given of them. It is difficult to understand, however, what bearing these variations in alleged copies can have upon the genuineness of the original documents; nor is it easy to discover when and how and by whom the alleged fraud upon the originals could have been committed. In the opinion of the Judge of the Civil Court, the documents bear no traces of having been tampered with or fabricated, and the appellant's father swears that they were not signed by him; therefore it must be supposed that the official persons who took the securities from the appellant's father after he had signed the depositions substituted others for them, or that afterwards the respondent, or some one on his behalf, induced the person who had the legal custody of them to give them up, and receive the fabricated ones in their stead. The appellant's Counsel also contended that the documents are shown not to have been genuine, from the fact of the securities having been taken from the appellant's father alone; and they referred to a Circular Order containing instructions to the Collectors as to the security to be given by public servants, in which they are required "to ascertain whether the property offered in security is free from mortgage, lien, &c., and whether the cousins (of the persons offering securities), if there be any, are willing to tender such securities, and obtain from them 'kararnamahs' to the same effect;" and urged that as the depositions produced show that there was an adopted son, who was a co-parcener with the appellant's father, it was not likely that the Collectors would have so entirely disregarded their instructions as not to have obtained additional security from the respondent. If, however, the Collectors were satisfied that the portion of the property belonging to the appellant's father was an ample security, they might be a little remiss in this respect; but, at all events, if the choice as to the integrity of these documents lies between a slight dereliction of duty on the part of the Collectors, or a gross fraud committed by them, or by some other persons for the benefit of the respondent, there is little difficulty as to the conclusion which ought to be adopted. If the genuineness of the depositions is established, of which their Lordships entertain no doubt, they are decisive of the case. In them the

appellant's father three times deliberately styles the respondent an adopted son. Now, if there were no adoption at all, or if the actual adoption were for any reason legally invalid, the respondent would of course not be entitled to that designation. They amount, therefore, to a complete admission of the whole title of the respondent both in fact and in law, and show the objections which have been urged to his claim, in the opinion of the appellant's father, who probably was well acquainted with all the circumstances, and may be assumed to have known the Hindoo laws and customs, had no foundation. Their Lordships, therefore, will recommend to Her Majesty to affirm the decrees appealed from, and to dismiss the appeal, with costs.

The 17th February 1864.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir. L. Peel, and Sir J. W. Colvile.

Hindoo Law of Inheritance—Sisters—Daughters Marriage and Marriage portions of).

On Appeal from the Supreme Court of Bombay.

Venayeck Anundrow and others,

versus

Luxoomeebaee and others.

According to the Hindoo Law, in Bombay at least, sisters are heirs of their brothers. The marriage of daughters and their marriage portions do not exclude them from participation.

THE question raised by the demurrer, the subject of this appeal, is whether the plaintiffs in the suit, the appellants, have by the statements in their Bill, shown any interest in the estate of Bhugwantrao, the Testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhugwantrao was a Hindoo, resident at Bombay. He died in the year 1851, having made his will in the English language, dated in that year. He appointed his wife, one of the respondents, now his widow, sole executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus :—"All the outstanding debts due to me you must collect, and after paying legal debt due by me, and the expense of the funeral, and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to Luxoomeebaee, my dearly beloved wife, and my little son Gujanon, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression "the joys, &c., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys, &c."

The testator, as has been said, died in the same year, survived by his wife, the executrix, one of the respondents, and her three daughters by him, who are also respondents, and by the infant son Gujanon, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the residue—whether as giving or not giving an absolute interest, and whether as giving or not giving an interest, in the nature of what English Lawyers call a joint tenancy, or as giving or not giving an interest of the nature of what English Lawyers call a tenancy in common. In the circumstances that happened, their Lordships do not think it necessary to give an opinion upon that point or those points of construction : for whether the gift was absolute or not absolute, whether in common, as we call it, or in joint tenancy as we call it, upon the Testator's death, the widow and his son took the whole between them, at least in

possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the appellants. Their claim is thus:—“They contend that, upon the death of Gujanon, the absolute interest in the whole, or a moiety, subject to a life-interest in the widow, devolved upon his heirs, and that those heirs were the appellants, and not the three daughters of the testators, the co-respondents with the widow. They make out, they say, that proposition by the nature of their relationship, namely, that they were the sons of the brother of the testator, and being so related in the male line, they excluded by law, they say, the sisters of Gujanon from the heirship to him, a proposition which the respondents deny.

Now, upon the question of the capacity of the sisters to be heirs to their brother different views of the law appear to have been taken in different parts of India, and a general leaning in favour of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point upon which, probably, it may be said, that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice, in giving his judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says (page 9 of the Appendix, line 29), “Supposing, then, Luxoomeebaee to take a life-estate only in the descended inheritance, the reversion vests in the next heir of Gujanon, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are defendants in this suit. This appears, from *Muyukhu*, Chap. IV. p. 19, where, after enumerating the mother (*see* pp. 14 and 15), the uterine brother and his sons (Sections 16 and 17), the paternal grandmother (Sec. 18), (and no paternal grandmother of Gujanon is shown to be in existence on the face of this Bill), the Commentator, in Section 19, proceeds thus:—‘In default of her (the paternal grandmother) comes the sister, under this text of *Menu*. To the nearest *Sapinda* (male or female) after him (or her) in the third degree the inheritance next belongs, and thus of *Brubhusptia*, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.’ And the next rank is hers (the sister’s), both from her being begotten under the brother’s family name, and there being no further reservation with respect to the Gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of *Muyukhu* on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the *Mitackshara*, the sister comes next in order of inheritance after the brother. The passage in the *Mitackshara* is contained in the first paragraph of Chapter II., Section 4; ‘On failure of the father, brethren share the estate.’ Nanda Pandita and Balam Bhatta, says Mr. Colebrooke, in his note to this passage, consider that, as including ‘brothers and sisters’ in the same manner in which ‘parents’ have been explained ‘mother and father,’ and conformably with an express rule of Grammar. They observe that the brother inherits first, and, in his default, the sisters; this opinion, Mr. Colebrooke states, is controverted by Camalacara and the author of *Muyukhu*. It certainly is so in Section 16 of Chapters IV and VIII of the *Muyukhu*, p. 105; but it should be observed that in p. 15 of the same Commentary, the doctrine of the *Mitackshara*, now generally regarded as established as to the word ‘parents’ including both ‘mother and father’ is controverted, and on unprecisely the same grammatical grounds.”

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction

of the word 'brethren,' is wrong; but certainly neither are they satisfied that the construction put by the passage in the Mitackshara, which has been mentioned, and generally adopted, as it seems in Bombay, is wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present plaintiffs. Accordingly, their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that, in Bombay at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is that, in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which have they any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed with costs.

It ought to be added, as to the argument that the marriage of the daughters and their marriage portions excluded them from participation, that their Lordships think there is no ground for that argument either in principle or otherwise.

The 5th May 1864.

Present:

Lord Kingsdown, Lord Justice Knight, Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colville.

Chakeran Lands (Nature of tenure)—Resumption.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Joykishen Mookerjee,

versus

The Collector of East Burdwan and another.

Suit for the resumption of certain chakeran lands in the appellant's talook. The Government contending that the lands were appropriated to the maintenance of a chowkeedar or village watchman, and that the holder of these lands was liable to the performance of none but Police or chowkeedary duties; the talookdar (appellant) contended that the lands were gram surinjamee lands not liable to the performance of any but personal services to him, and not legally appropriated for the performance of these services but resumable by him.

HELD, by the Privy Council, that the lands in question were to be considered as appropriated to the maintenance of a chowkeedar or village watchman in this talook, that the right of appointing such officer belonged to the talookdar, and that such officer was liable to the performance of such services to the talookdar as, by usage in the zemindary, chowkeedars were accustomed to render to the zemindar.

Whether the talookdar having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the person so appointed, or whether the person so appointed may himself be entitled to recover the land.—*Quære.*

THE question in this case relates to a small quantity of land, consisting of nineteen beegahs and some cottahs, in the talook of Gobindpore. This talook originally formed part of the great zemindary of Burdwan, and previously to its purchase by the appellant, it had been granted in putnee by one of the Rajahs of Burdwan. In the year 1852, it was put up to sale by the Collector of the Zillah of East Burdwan, under the provisions of Regulation VIII. of 1819, in order to realize the amount of arrears of rent due from the then putneedar. The appellant became the purchaser, and entered into the receipt of the rents and profits of the talook, and it must be assumed that as putneedar he became entitled to the same rights in the subject-matter of the suit which were enjoyed by the zemindar.

At this time the lands now in dispute were in the possession of a person named Ahmed Buksh, who paid no rent for them either to the Government or to the talookdar, but instead of rent, performed certain services. What was the nature of

those services, is one of the matters now in question. Another is, what is the character of the lands thus held by these services: are they legally appropriated for the performance of these services, or are they lands which are the free and absolute property of the talookdar, and which he is at liberty to resume and dispose of as he may think fit, either dispensing altogether with the services, or providing from other sources for the performance of these services if he be under any obligation to secure their performance?

On the 11th January 1855, the plaint in the present suit was filed, and the Collector of Burdwan, as representing the Government, was made a defendant.

The plaint insisted that the lands in question were part of the talook; that the lands were what are called mal surinjamee or gram surinjamee, held for the performance of services personal to the zemindar, and for the protection of his property; that Ahmed Buksh had ceased to perform any zemindary services; and that the plaintiff had appointed another person to perform such services, and was entitled to resume possession of the lands.

On the 9th January 1856, the Collector of Burdwan filed his answer, and he thereby insisted "that the land in question was not mal surinjamee (service land for taking care of the mal or zemindar's property), but chakeran land for the performance of Police or chowkeedaree duties; that the land being chowkeedaree chakeran land, the zemindar has no power to interfere with the property as long as the Policemen carry out their various duties."

The main issue raised between the parties therefore was to the nature of the tenure on which the land was held. The contention on the part of the appellant being that they were of one description, and subject to the performance of no Government services, and the contention of the respondent, that they were of another description, and subject to the performance of no services to the zemindar. Shortly before the Collector put in his answer, the Foujdarry Court of East Burdwan had issued an order "that a perwanna be sent to all the Darogahs of this jurisdiction, that the chowkeedars under their control be instructed not to attend to zemindary duties."

It appears that these zemindars were entrusted previously to the British possession of India, as well with the defence of the territory against foreign enemies, as with the administration of law and the maintenance of peace and order within their district; that for this purpose they were accustomed to employ, not only armed retainers to guard against hostile inroads, but also a large force of thannahdars or a general Police force, and other officers in great numbers, under the name of chowkeedars, paiks, and other descriptions, as well for the maintenance of order in particular villages and districts, as for the protection of the property of the zemindar, the collection of his revenue, and other services personal to the zemindar.

All these different officers were at that time the servants of the zemindar, appointed by him and removable by him, and they were remunerated in many cases by the enjoyment of land rent-free or at a low rent in consideration of their services.

The lands so enjoyed were called chakeran or service land. These lands were of great extent in Bengal at the time of the Decennial Settlement, and the effect of that settlement was to divide them into two classes:—

1. Thannahdary lands, which by, Regulation I. of 1793, Section 8, Clause 4 were made resumable by the Government; the Government taking upon itself the maintenance of the general Police force, and relieving the zemindar from that expense.

2. All other chakeran lands, which, by Regulation VIII. of 1793, Section 41 were, whether held by public officers or private servants in lieu of wages, to be annexed to the malguzari lands, and declared responsible for the public revenue assessed on the zemindaries, independent talooks, or other estates in which they were included in common with all other malguzari lands therein.

It is clear upon the evidence, and, in fact, was not disputed at the Bar, that lands in question are chakeran lands of the second class, and it follows that, if

resumable at all, they are resumable by the appellant; and, secondly, that if the services on which they are held are Police services at all, they are the services of chowkeedars or village watchmen.

The zemindar had an interest in the performance of the duties of the village watchmen, inasmuch as they protected his property, but the public also had a great interest in their maintenance, and in the peace and good order which they were employed to preserve, and the Government as representing the public, reserved therefore a strict control over them.

Accordingly various Regulations were passed for the purpose of enabling the Government to effect this object. Registers were required to be kept of the different persons filling these offices in each zemindary, with a statement of the funds allotted for their support. The officers themselves were made subject to the orders of the Darogah, or Superintendent of the Police of the district. The zemindar was required to remove them on complaint of their misconduct by the Darogah, and, finally, they were made removable by the Magistrate on sufficient cause. But we can find nothing in these Regulations which takes from the zemindar the right of nomination of these officers, or which deprives him of the power of himself removing them and appointing other fit persons in their stead, and nothing which deprives him of the right of requiring from the chowkeedar such services as he was bound by law or usage to render to the zemindar. It might well happen that either by long usage or by the original contract when the lands were granted, the village watchman might become liable, in addition to his Police duties, to the performance of other services personal to the zemindar, as the collection of his revenue and the like. Indeed, the rules laid down for the Decennial Settlement appear to us to recognize the interests both of the zemindars and the public in lands of this description. They were not to be included in the malguzari lands, for the purpose of increasing the jumma, because the zemindars had not the full benefit of them; but they were to be included in the malguzari lands, for the purpose of securing the assessment, because, in the event of a sale upon default of payment of the assessment, it would be important that they should be transferred to the purchasers under the Government, with whom the appointment of the person whose duty would in part be to attend to public interests would vest.

Such being in our opinion the general law, let us look at the facts of this particular case. It is found by the Zillah Judge that the duties performed by the persons in possession of these lands, both before and since the Decennial Settlement, have been partly Police and partly Zemindary, as follows:

Zemindary.—1. (Personal to the Zemindar.) To collect or enforce collection of rents; to guard Mofussil treasures, and perhaps to escort Mofussil treasures. 2. (Common to the village community.) To keep watch at night, and to secure the harvests. Police.—To maintain the peace; to apprehend offenders under the orders of the Thannahdar; to report criminal occurrences; to convey public money to the Sudder Treasury, (this duty has ceased since the Decennial Settlement); to serve as guides to travellers.

The Judge adds: "I may add that it is notorious, and in my certain knowledge, that most of these duties are at this time performed by the village watchmen in Burdwan."

From this finding their Lordships see no reason to dissent.

But it may well be that, although these lands have been held by the predecessors of the defendant Ahmed Buksh, and were held by him as Chowkeedar, liable to perform services to the public, as well as to the Zemindar, yet that there has been no legal appropriation of the land for that purpose, and that the appellant may be entitled to recover the land, though he may be under an obligation to provide for the performance of such services as a chowkeedar is liable to perform for the public.

The evidence appears to stand thus:—

At the time of the Decennial Settlement, though these lands were included in the Zemindary, their annual value does not seem to have been taken into account in fixing the jumma. This is consistent at least with the hypothesis that they were then appropriated to the payment of some officers whom it would be necessary for the Zemindar, either for his own or for the public interest, to maintain. We find that in 1813 the particular lands in question were in this talook held by Shrishtee-dhur, who is described as Thannahdar, and they appear ever since to have been held by persons succeeding him in the same character. They were not held as Thannahdary lands in the strict sense of the expression—lands of that description had already been resumed by the Government—but as chowkeedary lands; lands appropriated to the maintenance of an officer who performed, and was liable to perform, duties as a village watchman. We think that these circumstances sufficient to warrant the inferences that the lands in question were at the time of the Decennial Settlement appropriated, and still are liable to the maintenance of such an officer, and that the Talookdar has no right to take possession of them for his own purposes, and hold them, discharged of the obligation to which they are subject.

On the other hand, it is established by the evidence that the chowkeedars in this district have always been accustomed to perform services personally to the Zemindar as well as to the Police. This is distinctly stated to be the fact by Mr. Skipwith, the Officiating Collector in 1837, and by the Judge of the Zillah Court in the present case, and it is admitted by the Government. We think, therefore, the order of the Foujdarry Court in December 1855, forbidding the performance of Zemindary services by the chowkeedar, was without any warrant in law.

Cases of this description must, as it seems to us, depend mainly, if not wholly, for their decision upon the question, what was the tenure or character of the lands at the time of the Decennial Settlement.

In this case the result, in our opinion, is that both parties have insisted on more than they were entitled to. One side has contended that the holder of these lands is liable to the performance of none but Zemindary duties; the other, that he is liable to the performance of none but Police duties.

Under these circumstances, we feel considerable difficulty as to the course which we ought to take. If we advise the affirmance of the judgment, we may seem to countenance the opinion that the Government has the right to take possession of these lands, and to appoint a person to perform, as chowkeedar, general Police duties to the exclusion of duties to the Talook and the Talookdar, and this is very far from being our opinion.

On the other hand, we think that we cannot advise the reversal of the judgment having regard to the form of the pleadings, without maintaining the position, assumed by the appellant; that these are gram surinjamee lands, not liable to the performance of any but personal service to the appellant, and from this opinion also we dissent.

The state of the pleadings prevent us from reaching the real merits of the case. It is not for us to say how these merits may best be reached. It may be that the appellant having appointed a fit person to discharge the duties of village watchman, and to perform the duties personal to himself, may be entitled to recover the land for the purpose of its being held by the persons so appointed, or whether the person so appointed may himself be entitled to recover the land. On these points we give no opinion. But on the whole, having regard to the appellant being plaintiff in the suit, and having failed to make out the case which he set up, we think that we shall best discharge our duty by humbly advising Her Majesty to affirm the judgment complained of, but without giving any costs, and to declare that the lands in question are to be considered as appropriated to the maintenance of a chowkeedar or village watchman in this Talook, and that the right of appointing such officer belongs to the Talookdar, and that such officer is liable to the performance of such services to the Talookdar, as, by usage in this Zemindary of Burdwan,

chowkeedars have been accustomed to render to the Zemindar, and to declare that the affirmance of the judgment is to be without prejudice to any, if any other suit which the appellant may think fit to institute in respect to the matters in dispute in this cause.

The 1st July 1864.

Present :

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Evidence—Maps drawn for one purpose not admissible in suit for another purpose.

On Appeal from the Sudder Dewanny Adawlat at Calcutta.

John Kerr,

versus

Nuzzur Mahomed and Azeem Serang.

The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose, and a purpose totally irrelevant to the subject of the dispute between them.

THE question in this case relates to a certain quantity of land between 3,000 and 4,000 beegahs, which are claimed on the one hand by the appellant, Mr. Kerr, and on the other hand by the respondent, Azeem Serang.

The right to these lands depends entirely upon the boundaries of two lots of land in the Sunderbunds, which were granted, in the year 1829 or 1830, by the Government of Calcutta. The lots are conterminous. One was granted to a gentleman of the name of Douglas, and now belongs to the respondents. The other belongs to Mr. Kerr. These two lots are each bounded on the east by a stream called the Poona Khal, on the west by a stream called the Tumboolda Khal, and the line where they join (being the southern boundary of the one, and the northern boundary of the other) is described in one of the pottahs as "a line drawn due east and west from the confluence of the Aryhee Baukee Khal," and in the other, "as a line drawn from the Tumboolda to the Poina, where a small khal issues."

Now these two descriptions taken together ascertain beyond all doubt or question what is the true boundary of these lands. Each description says, that it is to be a line from east to west from the Tumboolda Khal to the Poina Khal; and one of these descriptions specifies the point from which the line is to be taken as the confluence of the Aryhee Baukee Khal.

There is no question in this case as to the point where the Aryhee Baukee Khal is; and all the different maps that have been drawn correspond in that particular, and in drawing a line from the Aryhee Baukee Khal to the opposite stream of the Prina Khal. The question is, in what way that is to be drawn? The appellant insists that the line is to be drawn not due east and west, but to the north-east, making a difference of several thousand beegahs of land in favor of the one or to the prejudice of the other lot.

We have the pottahs before us under which both parties claim, which state that the line is to be drawn due east and west.

Two maps, one by Captain Hodges, and the other by Captain Prinsep, are in evidence; the boundaries are marked upon them, and they entirely correspond with the description in the two pottahs, as a line drawn due east and west from the one point to the other. The quantities of each lot are stated in the maps, one as 8,900 beegahs and the other as 8,300 beegahs, and the boundaries so described and marked upon these maps entirely correspond with the quantities thus ascertained.

It is a matter of surprise that it should be possible under such circumstances that any difficulty could arise, or that the Government could have been induced to grant a pottah to the present appellant, claiming under a grant of 8,300 beegahs of no less than 13,000 odd beegahs: those 13,000 beegahs including between 3,000

and 4,000 beegahs belonging to the respondents, and the remainder being made up from lands belonging to other persons not represented in this suit.

When we come to look into the case, we find how this has happened. It turns out that in 1840 a dispute arose, not in the least with respect to the boundaries of Douglas' plot, not in the least with respect to the boundaries of Kerr's plot, but with respect to the division of land lying to the south of Kerr's, and still more to the south of Douglas, which plot belonged to certain co-parceners or tenants in common, of whom Mr. Kerr was one.

There was a dispute as to the partition of these lands; and upon that occasion a Mr. Turner, a Government Surveyor, was called in for the purpose of settling that dispute, not for the purpose of settling anything as to the lots of Douglas' or Kerr's land, but to settle as between these differing co-tenants what were the proper limits of their respective properties. A map was drawn out by Mr. Turner upon that occasion, and it seems that a large portion of land to the north, which included Mr. Kerr's plot, was described in that map.

Upon looking at that map closely, we do not see that it professes to describe the northern boundary of Kerr's land, but whether it intended to do so or not is utterly unimportant: it was not the subject of any question or dispute for the settlement of which Mr. Turner had been employed.

Some time after this, the respondents obtained a grant of Douglas' land which had been resumed by the Government in consequence of the neglect of Douglas to cultivate it, according to the terms of the pottah. Upon this occasion a survey was made by Mr. Mullins, who was then the Surveyor of the Government, for the purpose of ascertaining the particulars of the grant, and Mr. Mullins made his report to the effect that Douglas' grant, described as No. 60 in Hodges' map, contained 8,900 beegahs of land. Some time after this, it seems that Mr. Kerr disputed the boundaries of Mr. Douglas' grant, and Mr. Mullins was called upon by the Government to draw a map determining the boundaries. Instead of doing that, he took Mr. Turner's map which had been prepared for a totally different purpose, and made a copy of it without any examination whatever into the subject on his own part.

In 1851 a new grant was proposed by the Government for the purpose of converting these grants, which had been originally made in 1829 or 1830, into tenures of a somewhat different description. Upon that occasion it became necessary to ascertain what quantity of land had been brought into cultivation in Mr. Kerr's lot, and upon what extent therefore the rent was to be calculated; and Mr. Mullins was called upon by the Government to make the necessary survey and return. Mr. Mullins, it seems, was a son-in-law of Mr. Kerr, and he sent in to the Government a copy of the plan which he had prepared before in 1851, by which he actually made out that under this grant of 8,300 beegahs of land, Mr. Kerr was entitled to 13,640 beegahs, Mr. Kerr not even pretending to have the least additional title to any quantity of land beyond that which he held under his original pottah. A more scandalous abuse of the authority placed in the hands of this Surveyor was probably never witnessed. This very man who had certified 8,900 beegahs as being the amount of Douglas' plot, now made another report, by which he reduced that plot to 5,000 odd beegahs; the 8,300, which had been granted to Kerr, his father-in-law, being increased to 13,600 beegahs. It is satisfactory to find that this gentleman did not continue long in this office which he so abused; for it appears that in 1852 he was removed by the Government, the Government at the same time expressing its regret that he had not been removed two years sooner.

There is, therefore, really nothing in this case upon which any question can arise. We have the original grants, with the clear and precise descriptions, corresponding with the boundaries and the quantities, and we have the maps to which those documents refer. The whole difficulty in this case has resulted from that improper proceeding on the part of Mr. Mullins to which we have referred.

What is there said on the other side? There is really nothing. It is said that the respondent Azeem Serang was a servant of Mr. Kerr at the time when that map of Mr. Turner's was drawn. Of what possible importance can that be? He assisted Mr. Turner under the directions of his master. Probably he knew nothing about the boundary. It had nothing to do with the boundary of Douglas' property. It could not in the least affect the rights of the property as between those individuals. That map was drawn for a totally different purpose, and a purpose totally irrelevant to the subject of this dispute.

The only other point which is relied upon is, what is called the receipt and supposed acquiescence on the part of the respondents in the boundaries subsequently proposed or settled by Mr. Gomes, another surveyor, and which in truth is neither more nor less than an adoption of this most erroneous and improper map which had been prepared by Mr. Mullins. It does not appear from that document that at the time when it was made, the respondents knew in the least what those boundaries were which had been thus settled. It is quite clear that they could not have done so. It was giving up the whole point for which, against extraordinary difficulties, and with remarkable perseverance, and at great expense probably, they had been struggling for six years. It may be observed that Gomes had at first proposed to draw up a map, and report according to the actual state of the titles and the truth of the case; but he was prevented from doing so by the interference of the appellant, who procured an order from the Government that in settling the boundaries he should not disturb the plot granted to Mr. Kerr.

Their Lordships are of the opinion stated in the report of Mr. Commissioner Stainforth, who was appointed by the Government, after the institution of the suit, to look into the matter and correct what had been done so irregularly and improperly. After going through all the facts of the case he says:—"Under these circumstances it is abundantly clear to me that Mr. Turner's map is an incorrect if not collusive document, and that Mr. Kerr, in claiming a boundary running north-east from the Tumboolda, instead of due east and west, is encroaching on his neighbours' lands."

Their Lordships cannot look at what has taken place in this case without feelings of great regret, and of something more than regret. It is a case in which they can do but very inadequate justice by recommending, as they will do, that the appeal should be dismissed with costs.

The 23rd July 1864.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Sale of Estates for arrears of Government Revenue—Under Tenures—Cancellation of Enhancement of rent.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Ranee Surromoyee, Widow and Heiress-at-law of the late Rajah Kristonauth Roy Bahadoor,

versus

Maharajah Sutteschunder Roy Bahadoor, Son and Heir-at-law of the late Maharajah Sreeschunder Roy Bahadoor.

The object of Section 5 Regulation XLIV of 1793; taken together with Section 7, was not the destruction of the under-tenures upon the sale of the parent estate for arrears of Government Revenue. It only empowers the purchaser at such sale to avoid the subsisting engagements as to rent, and to enhance the rent to that amount at which, according to the established usages and rates of the Pergunnah or District, it would have stood, had the cancelled engagement so avoided never existed.

Quere.—Whether such a power is given only to the purchaser or to him and his heirs, or whether it is a power attaching to the zemindary and passing to subsequent purchasers.

THIS was an appeal from a decree of the Sudder Dewauny Adawlut at Calcutta of the 26th of March 1859, from a decree of the Judge of the Zillah Court of Nuddea, in Bengal, of the 21st July 1858, confirming substantially a decree of the Principal Sudder Ameen of Nuddea, in Bengal, of the 19th of November 1857. The suit was originally brought by the respondent's father; and the relations of the parties to each other were those of zemindar and talookdar, the appellant holding as mesne tenant a portion of the zemindary. The object of the suit is to enhance the rent at which the appellant holds that portion; and no question is made upon the respondent's general title, nor upon the relation in which the appellant stands towards him. She does not dispute his right under other circumstances to bring this sort of action against her; and their Lordships, therefore, do not enter into the question, whether the action has been properly so brought. They give no opinion on that point. What the appellant insists upon is that this present action must fail, because her tenure is hereditary and at a fixed rent, which the zemindar has no power to enhance.

It will be convenient in the first place to state what, upon the evidence, their Lordships consider to be established as to the appellant's title, omitting for the present some parts of the evidence on which she relies, and to which too much importance has been, as it appears to their Lordships, attached in the Courts below. The interest, which she represents, was first created by grant in favor of a Mr. Alexander Seaton at some date prior to the commencement of this century. On parts of the land comprised within his grant, he laid out gardens and erected Factories, and other buildings; but there is no direct evidence that the grant was made for these purposes. He appears to have been a Civil Servant of the East India Company; and after some years, when leaving India for England, he sold the whole property to the grandfather of the appellant's husband; on his death, it descended to the father, and thence in due course to her husband, from whom she has inherited it as his widow. A portion of the land, during the course of years, has been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent has always been paid. Upon this state of facts, the appellant contends that she is not merely a mouroosce tenant, that is, one holding by hereditary tenure, but that she holds at a fixed rent, and under such circumstances as protect her from any enhancement of it.

The state of facts on the part of the respondent is this:—It appears that while Hurreenath Roy Bahadoor, the father of the appellant's husband, was in possession, the Government Revenue payable by the zemindary fell into arrear, and the property was therefore put up to public auction; one MODOOSOODUN SANDIAL became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time he sold the zemindary by private contract to one Mr. Harris, from whom on his death it passed to his widow Mrs. Helen Harris; from her it was purchased by the Maharajah Sreeschunder Roy, now deceased, who in August 1856 commenced the present suit, and on his death the respondent, inheriting the zemindary, has continued it.

Upon this state of facts the respondent contends that, as he claims under MODOOSOODUN SANDIAL, he has acquired all rights which MODOOSOODUN SANDIAL had; and that as he purchased at Government auction, he was entitled by the Regulations then in force to cancel the lease under which the appellant's ancestor was holding, and of course to impose new terms as to the rent.

It is, as it seems to their Lordships, necessary to the respondent's success, that MODOOSOODUN SANDIAL should have had in him, at the time when he sold to Mr. Harris, the rights above stated, so that he himself might at that time have enhanced the rent of these lands; that these rights should have passed to Mr. Harris, and the subsequent purchasers of the property down to and including

the respondent's father; and that they either could not have been or have not been in fact waived by the respondent's father, or by any one of the prior owners, for, unless this be the case, their Lordships see no ground on which the hereditary tenure could be disturbed or the rent enhanced.

The reliance of the respondent is on some one of the Regulations which have been made at different times in regard to purchasers at Government auction sales in the case of zemindaries from which the Government income has not been duly paid. These Regulations have been couched in different language, but all with the same policy in view as regards the present question. It has been assumed, as the foundation of them, that the default of the Zemindar may have been occasioned by improvident grants of Talooks and other subordinate tenures at inadequate rents: that this was in breach of the condition on which the fund was originally created by the Sovereign Power; and the purchaser, therefore, has been set free from the obligation of these grants, with certain specified exceptions, and with certain limitations of his power as to new tenancies to be created. These laws, however, cannot but occasionally operate very hardly on the grantees of subordinate interests; and they have, therefore, been materially modified by an Act of 1859, not in force when this decree was made, and not, therefore, directly applicable to it; but such Regulations must, on general principles, receive a strict construction. There seems to have been doubt in the minds of the respondent's advisers on which of these Regulations his case could safely be rested, and it would appear from the proceedings in the Court below, that it was intended to rest it on a Regulation, Act I. of 1845, which certainly would not have supported it, because the sales relied on was not affected under that Regulation, and its provisions are limited to sales so effected. Upon the argument before their Lordships, the Counsel for the respondent relied on the 5th Section of Regulation XLIV. of the year 1793, which is the earliest of the Regulations on this subject; and they contended that, although subsequent Regulations upon the subject have been passed in different language and repealed, this 5th Section of Regulation XLIV. of 1793 has never been repealed, but was in force at the time when the sale in question was made and this action was commenced. Whether, upon the true construction of all the Regulations taken together, this particular Section ought to be taken to have been repealed or not, their Lordships do not think it necessary to determine. They assume in favor of the respondent that it stands unrepealed and in full force, and will deal with the case upon that footing. The language of this Section is no doubt favorable to the respondent's case. It provides that, when a zemindary is sold at a public sale for discharge of arrears due from the proprietors to the Government, "all engagements which *such proprietors* shall have contracted with dependant Talookdars, as also all leases to under-farmers and pottahs to ryots, *shall stand cancelled from the day of sale*, and the purchaser shall be at liberty to collect from such Talookdars, and from the ryots, whatever the former proprietors would have been entitled to demand according to the established usages and rates of the pergunnah or district in which the properties lie, had the engagement so cancelled never existed." But the 7th Section of this same Regulation XLIV. of 1793 provides, that this is not to authorize the assessment of any increase upon the lands of such dependant Talookdars as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case on which they think it safe to rely, see their way to the belief that the appellant brings her case within the 7th Section; but they cite it because it may have a bearing on the construction of the language of the 5th Section. The respondent contends that, by the operation of the words "*stand cancelled from the day of sale*," the existing interest of the Talookdar *ipso facto* ceased to exist, without any act done by the purchaser; that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claim-

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ing under him, the possession had remained in the Talookdar, and those claiming under him undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained abare possession at the will of the zemindar for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same Section, and from the 7th Section which creates an exception out of the provisions of that Section. English lawyers are familiar with this principle of construction applied as early as the time of Lord Coke (*see* 1st Inst., 45), to the disabling Statute of I. Eliz. cap. xix, sec. 5, and in several modern reported cases between landlord and tenant, on clauses of forfeiture in leases. Words which make a bishop's grant "utterly void and of none effect to all intents, constructions, and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease that it *should be void altogether* in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which for its justice, reasonableness, and convenience, must be considered of universal application. In the present case the object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the Zemindars who had made default; but cases of default might often arise where no improvident grant had been made, where the Talookdars and the ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other causes,—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the Section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same Clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the Talookdars and the ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent, "according to the established usages and rates of the pergunnah or district;" words in themselves showing that the Section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that, in terms, this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in Section 7, shows that what was aimed at by Section 5, was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

The conclusion at which their Lordships have arrived as to the construction of the Section is this—that a power was given by it to the purchaser, at a Government sale for arrears, to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none when the existing rent was already according to the usages and rate of the pergunnah.

This conclusion is of great importance in the determination of the remaining questions. The sale to Madoosoodun Sandial, according to the respondent's own case, took place sometime before 1823, and he found those under whom the appellant claims holding the land at an old rent of 64 Rupees 1 anna 12 pies; he did not

attempt to disturb the occupation or increase this rent, but received it during all the time he remained owner. He sold by private contract to Mr. Harris, from whom it passed to his widow, Mrs. Helen Harris, and from her again by private contract to the respondent's father, Maharajah Sreeschunder Roy, as has been already stated. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure—more than sixty years ago), the same rent has always been paid; and there is no evidence that when first imposed, nay, even when the purchase was made, it was not a perfectly adequate rent for the property. Great changes in the value of property have now arisen, and the respondent demands by his plaint an annual rent of 1,470 Rupees, or nearly twenty-three times the amount of the original rent, according, as he states it, to the actual rate current in the village.

If the Section in question did not authorize the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised that option in favor of the Talookdar; and even if the same rights passed from him unimpaired to Mr. Harris, and in succession to those who claim under him, the evidence is equally strong: nay, as regards Mr. Harris personally, it is stronger. It is, therefore, unnecessary to decide whether the Section is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the zemindary which passed to subsequent purchasers. Their Lordships, moreover, observe that the power given is to collect what the *former proprietor* would have been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and, as before remarked, in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him. Their Lordships, however, pronounce no opinion on this question, it not being necessary to decide it. They say no more than that a construction which would render the title to property unnecessarily uncertain, ought not in their judgment to be given to a power of this description.

On examining the Regulations, their Lordships are satisfied that the respondent's case can rest only on the powers given by the Section in question; and they are of opinion that those powers, assuming them to be in force, will not support the present action. They are glad to find that it is not their duty to support a claim which appears to them to be unjust. During the long period for which this property has been held at a small unvarying rent, it has been bought and sold, and changes and improvements have been made, no doubt, at a considerable expense, and upon the faith of the render to the zemindar continuing unchanged: he has purchased while that state of things existed, and it must be presumed for a price calculated accordingly; and it is manifestly unjust that he should be allowed to disturb it.

It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the appellant, or a confirmatory pottah produced by her as having been granted by Modosoedun Sandial, which, if received by the Courts below, would have concluded the case in her favor. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the pottah as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lordships act depended in any degree for its credibility or weight on such witnesses or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to

render to Her Majesty, which will be that the appeal be sustained, the decrees complained of reversed, the plaint in the suit dismissed, and any costs which may have been paid by the appellant in the Court below refunded, but that no costs of the appeal, or of any proceedings below, be allowed to the appellant.

The 23rd July 1864.

Present :

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Conversion of Government Securities deposited in Court, otherwise than at the instance of the depositor.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Rajah Sutteeshchunder Roy,

versus

Samasoodry Debia and others.

Where Government Securities bearing interest at 5 per cent were deposited in Court for payment of interest thereon to certain annuitants, and the Registrar of the Court, in pursuance of notices given by the Government Agent, converted the notes into 4 per cent. papers,—**Held** that, though the conversion of the notes was the act of Government and of the Court, not of the parties, the appellant was liable, under his agreement, to pay the annuitants the sum originally agreed upon.

THEIR Lordships have looked through the printed papers in this case, and also through the MS. documents handed in by the appellant for the purpose of showing how the Government Securities for 60,000 rupees deposited in Court, and at the time bearing 5 per cent interest, had been converted into Government notes bearing only 4 per cent interest. That examination shows that the statement in some of the papers that the 60,000 rupees were originally invested in a single note is mistaken. It appears that they were invested in notes of different amounts; and with respect to the notes for 42,000 rupees, the subject of the present appeal, that they were paid off at different times in the years 1833 and 1837, in pursuance of notices given by the Government Agent to the Registrar of the Court of Sudder Adawlut, and were converted into Government paper bearing only 4 per cent interest.

This had been done before the division of the notes amongst the parties entitled to the income; and though the delivery out of the notes to the claimants seems to have been irregular, it did not affect the conversion of the 5 per cent securities, into 4 per cent securities, which was the act not of the parties but of the Government and of the Court.

Now that conversion having reduced the 3,000 rupees which the annuitants were entitled to receive by one-fifth, the appellant under his engagement became liable to make it good; and in this suit he has been charged with the amount found due in that respect upon 42,000 rupees which seems to have been the only sum on which the Court considered that actual proof had been given of the conversion of the notes. This order does no injustice to the appellant. We cannot, therefore, advise Her Majesty to reverse the judgment complained of. We think it should be affirmed, without prejudice to any proceedings which the appellant may take for the full sum, of compelling the holders of the notes for the full sum of 60,000 rupees to bring them back into Court. The effect, however, of this may possibly be that the appellant may be found liable to a loss in respect of the conversion of the other notes beyond the 42,000 rupees.

The 29th March 1865.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Oude (Law of Dower)—Punjab Code.

On Appeal from the Court of the Judicial Commissioner of the Province of Oude.
Mulkah Do Alum Nawab Tajdar Bohoo, the widow and an heir of the late Secundur Hushmut General Sahib, a Mahomedan, deceased,

versus

Mirza Jehan Kudr, Nawab Mirza Zuwan, Ara Begum, and Rufootoonissa Begum.

According to the Punjab Code (held to be in force in Oude in the years 1859 and 1860) the dower mentioned in marriage contract (instead of being enforced as an absolute deed, as claimed by the appellant) is subject to a modification at the discretion of the Court, both in the case of a divorce and of the death of the husband.

THIS is an appeal, by the widow of the late General Sahib, against certain decisions which have been pronounced by the Judicial Commissioner in Oude, on a claim preferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our *Æra*, and by the settlement made upon it to which the father of the bridegroom was a party, the wife's dower was fixed at a crore of rupees, a sum equal to 1,000,000*l.* sterling.

The father of the bridegroom was a son of the King of Oude, and at that time heir-apparent to the throne.

General Sahib came over to England after the overthrow of the Oude Dynasty, and died here.

The Royal Family of Oude were all Mahomedans.

The General left a son, an adopted son, and two daughters, surviving him. These persons claimed to be co-heirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the titles of the other claimants as co-heirs.

After some attempts to settle the matter by arbitration which proved abortive, a suit was instituted in order to determine the rights of the parties.

In the course of these proceedings, an enquiry was directed with respect to the property which the General had left at his death, and, in the result, it appeared that it amounted in all to about 5 lacs of rupees. The claim of the appellant alone, in respect of her dower, amounted to a crore or 100 lacs, exclusive of other debts which are represented to be of very trifling amount.

The effect, therefore, of allowing the appellant's claim, would be, to a great extent, to defeat the claims of the other creditors, and to sweep away the whole property from the heir.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship, which may result from allowing them.

The case came first before two Assistant Commissioners in the Lucknow District Court, in August 1859; then, on appeal, before Colonel Abbott, the Commissioner Superintendent of the Lucknow division, on the 2nd December 1859; and lastly, before Mr. Campbell, the Judicial Commissioner of Oude, on the 23rd March 1860. All these gentlemen were of opinion that the claim of the appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some decrees as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of

Mr. Campbell, made on the 3rd March 1860, it was directed that the debts of the General should be first paid ; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs, but this decision was not to affect a sum of 1,10,000 rupees in Company's paper in the name of the appellant, which was to be retained by her as her absolute property. From this and the preceding orders, the present appeal has been brought.

Great trouble appears to have been taken by the Commissioner to ascertain the General Mahomedan Law upon the subject ; and opinions were obtained from the Courts of the several provinces of India, particularly with reference to the question whether, when extravagant sums, far beyond the means of the bridegroom to satisfy, were provided by settlement as dowers, such sums were to be treated as *bond fide* debts, to be paid *pari passu*, with other debts, on the death of the husband, though they might sweep away the whole property from the heirs ; or whether they were to be treated as securities for an adequate provision for the wife. The reports from the different provinces were not uniform—some being in favor of treating the sum fixed as an absolute debt ; others in favor of a modification of the demand with reference to what might be considered the proper dower of the woman.

It is not necessary, in the opinion of their Lordships, to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in Oude has been settled by specific Regulations issued by competent authority in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of February 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of Oude, addressed to Major-General Outram, who was appointed Chief Commissioner of the affairs of this Province.

The facts, as appearing in this letter, are these:—in the year, 1847-48 a few rules for Civil Judicature were drawn out by the Indian Government for the guidance of the officers employed in the Cis and Trans-Sutlej States. Then these were in 1849 extended to the Punjab, and it was left to the officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them, as practical experience might suggest.

These rules, thus amended, were, in 1854, reduced into a printed form, and circulated amongst the Judges of the Punjab. They are entitled “Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the Punjab ; to which is appended a proposed Form of Procedure.”

This Code, as its title imports, contains a statement—1. Of the principles of law to be adopted by the Judges ; and 2. Of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo Law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure introduces some alterations into the laws prevailing in the older Provinces.

This Code, thus introduced into the Punjab, had, in the opinion of the Government, been found to work well.

In February 1856, the King of Oude was deposed by the Indian Government, and the whole administration, Civil and Military, of the Kingdom was assumed by its Officers under its authority. To provide for the administration of justice, a number of Commissioners and Assistant Commissioners were appointed to act for different districts into which the country was to be divided ; and the general rules to be observed in the administration of justice, as well as in the ordering of the Province in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of Oude to that of the Punjab, appears in several passages of the letter. In paragraph 21 it is said :—

"It has been already intimated to you that the administration of Oude is to be conducted as nearly as possible in conformity with the system which has been introduced into the Punjab."

After explaining the advantages which had arisen in that Province from the introduction of the New Code, and observing that the Kingdom of Oude resembled very close in its population, language, creeds, and customs, the North-West Provinces, the letter proceeds:—"There is, therefore, every reason to believe and none to doubt that the system of administration as modified for the Punjab and divested of all those forms and technicalities which delay justice, and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of Oude, and more completely suited to the Province itself than it was to the Punjab; where, nevertheless, its success is undeniable."

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of Civil justice, with respect to which it observes that very material assistance is derived from the results of experience acquired in the Punjab.

Then follow the paragraphs on which the question as to the introduction of these rules into Oude mainly depends.

The 44th Section, after giving the history of those rules, which we have already read, proceeds thus:—

"These rules now, for the most part, guide the proceedings of the Judicial Courts in the Punjab, and they have been found so well fitted to the requirements of a new province and a simple people, so easy in their application, so acceptable to the population, no less than to the officers themselves, and so beneficial in their results, that the Governor-General in Council advises that they should be made the ground-work of the Civil Judicial system in Oude. Several printed copies of these "Rules" will shortly be furnished to you for distribution.

"45.—There appears to be no reason whatever for supposing that the Rules of Procedure will not be as applicable to the Civil Courts in Oude as to those in the Punjab, and there can be no objection to their immediate introduction. It is believed also the "Principles of Law" will be found sufficient in the first instance to guide the Judicial Officers in dealing with the various questions which will come before them in this branch of their duty. But it will not escape your observation that, in the preparation of the rules under notice, much attention has been given to the *lex loci*, and that especially in matters relating to inheritance, marriage, divorce, and adultery, adoption, wills, legacies, and partition, as well as in all commercial transactions a due regard to local usage has been enjoined. It cannot, of course, be supposed that the *lex loci*, or local custom, in provinces differing so widely as the Punjab and Oude is in all, or even in many, respects identical, and it follows that those provisions of the "Rules" which rest on the *lex loci*, in the Punjab cannot, with any propriety or without risk or injurious failure, be extended to the Province of Oude."

It appears to their Lordships that the effect of these Clauses is, that the principles of law, as well as the rules of procedure laid down in the Punjab Code, are to be adopted as the basis of the administration of justice in Oude, and to be applied, as far as they may appear to the Commissioners to be not unsuited to the circumstances of the country, but that, as far as they are founded upon local customs, varying the general law, whether Hindoo or Mahomedan, they are not to be applied to Oude, where the local customs would probably differ from those of the Punjab.

The 46th Section is in these words:—

"46.—While, then, the Governor-General in Council directs your attention to this collection of principles of law as calculated to afford material assistance in the absence of any better or more appropriate treatise, he refrains from requiring the strict observance of them until it can be ascertained how far they are applicable to the peculiarities of the Province and the customs of its people. With this end in

view, his Lordship in Council desires me to suggest that all the Commissioners and District Officers, and the most experienced of the Assistants should be required to study the "Principles of Law" in their daily application to the business brought before the Civil Courts, and, after the lapse of a twelve months or more, as may be hereafter determined, to report to the Judicial Commissioner the opinions which they may have formed of the applicability of the "Rules of Law" to the people of Oude, and to offer, at the same time, any remarks and suggestions which may have occurred to them. It may, perhaps, be advisable also to invite the opinions and observations of a few of the Native Extra Assistants whose past career and official knowledge, and more immediate contact with the people, may have qualified them to form a judgment on those points which touch upon native customs, and to give sound advice. On receipt of all these reports, it will be the duty of the Judicial Commissioner to study the suggestions which they contain, and to re-cast the collection of Rules of Law.

"It is not anticipated that the Rules of Procedure will call for much, if any, alteration; but it will rest with the Judicial Commissioner to give his consideration to these also at the same time, and to introduce such modifications as may appear advisable, provided they do not tend to introduce those complications and technicalities, the removal of which is the main as it is the most acceptable feature of the system successfully followed in the Punjab."

This Section is perfectly consistent with those which precede, and shows that the rules were to be generally acted upon, though strict obedience to them was not required until it had been ascertained how far they were applicable to the peculiarities of the Province and the customs of its people. With this view, its application is to be carefully watched by those who administer it, who, after a certain period, are to make a report upon the subject, with any suggestions which may occur to them for amending it.

The Indian Mutiny, which broke out in the following year, would probably prevent any report being made by the Commissioners, in compliance with the directions of the 46th Section, as early as was there contemplated; but after the restoration of the British authority, we find in the official report of the Administration of the Province of Oude for the year 1859-60, that the Punjab Code is stated to be the basis of the Civil Law of the country, and allusion is made to some modifications which have been introduced in it; but it does not appear that any such modification related to the subject now in controversy.

On the whole, their Lordships entertain no doubt, that the Articles of the Punjab Code generally were in force at the time of the date of these orders; the first of which was made on 25th August 1859, and the last on 23rd March 1860.

Then, on what grounds is the application of these rules to be excluded from the present case? If they are to be excluded, it must be on the ground that there is some *lex loci*, or special custom in Oude, by which the law of dower in that country differs from the general Mahomedan Law. But no such custom is pretended. The argument for the appellant rests entirely on the general Mahomedan Law.

The next question is, do the rules of the Punjab Code warrant a departure from the strict law, if law it be, by which, in all cases, a sum fixed as dower is to be enforced as an absolute debt? Upon this question no doubt can be entertained. They provide of a modification of the dower mentioned in a marriage-contract, both in the case of a divorce and of the death of the husband.

The 10th Clause, Section 6, is in these words:—

"By the Hindoo and Mahomedan Law, the dower of a married woman, if not entirely paid up at the time of marriage, is claimable by her at any subsequent time, and specially in the event of a divorce. Among Mahomedans it is usual, as a safeguard against capricious divorces, to stipulate for an amount of dower far beyond the means of the bridegroom to pay. Such a contract, if enforced by a Court, would ruin a defendant who had divorced his wife without reflecting on the liability

to which he was subject. Still, although the full amount need not be decreed, yet, in the event of a divorce, without a valid cause, heavy damages will be awarded to the wife, in proportion to the means of the husband."

The 11th Section provides for the event of the husband's death :—

"At the husband's death the dower is treated as a debt, and takes precedence of the claims of heirs, but not of other debt—it stands on the same footing with them. In this case, the Court would possess the modifying power of Clause 8, and award to the widow a fair sum with reference to the assets of the estate and the circumstances of the heirs."

The references to Clause 8 is either a mistake or a misprint for Clause 10.

It appears, by the proceedings in this case that these rules have been, and are, acted upon in the Punjab in dealing with cases of dower, and, by the orders to which we have referred, they have been extended to Oude.

It was suggested that this was only to apply to future contracts and not to contracts previously made. But their Lordships think it clear that these Sections provide for the mode in which all contracts of this description, which might come before the Courts were to be treated. Upon the whole, their Lordships are of opinion that the Commissioners were bound to apply the provisions of this Code to the case before them, and were at liberty to exercise a discretion in the division of the property in dispute between the widow and the heirs. As to the manner in which that discretion should be exercised, the Commissioner, whose judgment is appealed from, must be more capable of forming a correct judgment than their Lordships can be.

It may be proper to notice an objection which was taken ; that, in one of the orders appealed from, a provision was made out of the estate for an adopted son, though it was admitted by the Commissioner making the order that such son was not properly one of the heirs. But this will be corrected by the decision of Mr. Campbell, which directs the division to be amongst the co-heirs other than the appellant : and, at all events, it is a matter which relates to a fund in which she has no interest.

Their Lordships will humbly advise Her Majesty to affirm the order of Mr. Campbell of the 23rd March 1860 : but, as the case is one of novelty and some difficulty, they will not give any costs.

The 29th March 1865.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colville.

Suit for enhancement—Plea of Mokurruree Title—Production of documents in the Courts of India (attended with danger)—Title-deeds of dependent Talookdars.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Baboo Gopal Lall Tagore,

versus

Tilluck Chunder Rai and others.

The objection that the documents relied on by the defendants in support of their mokurruree title contain no expressions importing the hereditary character of the alleged tenures, was held to be one not open to the plaintiff in a suit for enhancement, where the pleadings admit the existence of the tenure, and the lawful occupation of the defendant, and the only question is whether the tenures are held at a variable or at a fixed and invariable rent. Even if the objection were open to the plaintiff, it was held that it could not prevail against the evidence which the record afforded that, for upwards of a century the talooks in question had been treated as hereditary, and, as such, has descended from father to son and been the subject of purchase. The production of documents in the Courts of India is subject to risk ; and of all men, the dependent talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the

recognition of his title by his existing zemindar, he may, at some future time, have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

THE question on this appeal, which has been heard *ex-parte*, is upon the alleged right of the appellant, as zemindar of Tuppah Nazirpore, in the Zillah of Backergunge, and Province of Bengal, to re-assess and increase the rents payable in respect of certain lands forming part of his zemindary, which formerly constituted one, but were afterwards divided into five dependent talooks.

The appellant derives his title to the larger part of his zemindary from a sale for arrears of Government Revenue, which took place in 1819. Fourteen-sixteenths were thus purchased, partly by the appellant's father and a cousin jointly, and partly by one Petumber Mozumdar. All these have since, by descent or sub-purchase, become vested in the appellant. The remaining two-sixteenths are stated to have been acquired, in 1830, by private purchase from a Mr. John Panioty and others, in whom they were then vested.

To enforce his claim to enhance the rents of the five talooks, it was necessary for the appellant to institute five separate suits. The amount involved in each of them was below, whilst the aggregate amount involved in the five exceeded, the sum, from which an appeal to Her Majesty in Council lies as of right. The order of the 22nd of February 1860, giving special leave to appeal, provided that, in case the parties in India should consent that the order to be made by Her Majesty in one suit should govern the others, there should be an appeal in one suit only. This consent has, unfortunately, not been given; the proceedings in all the suits have been sent home, and are now before their Lordships. The argument of the learned Counsel for the appellant embraced all the suits, and this judgment must be taken to be given in each of them.

The five suits were commenced in September 1855. Each was founded on the alleged right of the zemindar claiming, in part at least, as purchaser at a sale for arrears of Government Revenue, to enhance the rents of a talook described as *tush-kisi zimma*, or a sub-tenure, held upon payment of a rent variable according to the current rates of the district.

The title set up by the respondents is to this effect:—They allege that, as early as 1704 A. D. (being the year 1111 of the Bengalee era), one Mookondo Ram Chuckerbutty, took in the name of his son Ram Chuckerbutty, an amildaree pottali of the lands in question in the five suits from Syed Shumsuddeen Mahomed the then zemindar, and held them as one talook; that on his death, his three sons, the said Ram Chuckerbutty, Gungadhur Shedhanto, and Gopeenath Chuckerbutty, held the talook in thirds, making a separation by guess of part of the land, but holding the other part jointly; and that in 1755 A. D. (or 1162 B.) they made a settlement, witnessed by the seal of Syed Imamooddeen Mahomed, the descendant of Shumsuddeen, whereby the rent of the waste lands; being postponed for future arrangement, they undertook to pay for the remaining and productive land a joint jumma of 1,901 rupees. They further allege that afterwards a complete separation between the brothers took place; that Gungadhur took his share of the lands held jointly, as well as those cultivated by him separately, and formed thereout a separate talook called Sheeb-Kant (a name compounded of the first syllables of the names of his two sons); that Gopeenath made in the same way a separate talook out of his share, which he named "Lukhee Kant," after one of his sons; that the remaining share continued as a third talook in the possession of Ram Chuckerbutty, or of his two sons, Beeshodeb and Gobind Prosad; and that this division was sanctioned by the zemindar, and the consequent mutation of names effected on the 26th of Bysack 1164 (A. D. 1757), by a writing, under the seal of Syed Imamooddeen, which provided that the jumma or rent should be assessed according to the quantity of land held by each person as ascertained by subsequent measurement. They state, however, that, before this measurement took place, Ram Chuckerbutty's share was sub-divided between his two sons Beeshodeb and Gobind Prosad, and a further

mutation of names effected in 1762; one of these sub-divisions becoming talook Ram Lukhun, the other Beeshtodeb. They further allege that, after this, the contemplated measurement and survey took place; that the talook of Sheeb-Kant Chuckerbutty was then assessed at a fixed morkurruree jumma of 691 rupees 9 annas and 2 cowries; that the talook Lukhee Kant Chuckerbutty was assessed at a like jumma of 643 rupees 15 annas and 13 gundahs; that talook Ram Lukhun Chuckerbutty was in like manner assessed at 335 rupees 6 annas and 9 gundahs; and that of Beeshtodeb existing under the name of Ram Chuckerbutty, at 337 rupees 6 gundahs; and that accordingly on the 14th Joistee 1174 (being some time the year 1767) separate *bundobusts*, or settlement papers, under the seal and signature of the zemindar Syed Imamooddeen Mahomed were granted to the holders of each talook, and contained these words:—"The above amount of jumma being paid in current coin year by year, no increase shall be made to it, nor shall you give any."

Thus far the title of the defendants in each of the five suits is common to all. The subject of the first suit is the talook Sheeb-Kant Chuckerbutty; that of the second, Ram-Lukhun Chuckerbutty; that of the third, Lukhee-Kant Chuckerbutty; that of the fourth, Radha-Madhub Chuckerbutty; and that of the fifth, Ram-chunder Chuckerbutty; the two last-named talooks having, after the death of Beeshtodeb, been formed out of his talook on a partition and division between his two sons, Radha Kristo and Radha Madhub, in or some time before A. D. 1807. The defendants in the several suits derive their title from the talookdars with whom the settlements of 1767 were made, some by descent, others by purchase; but it is not necessary for the determination of the present appeal to state these devolutions of title in detail.

From what has been said it is obvious that the principal question in each suit was whether the talook, that was the subject of it, had been held from a period considerably anterior to the Decennial Settlement at a fixed or morkurruree jumma, or was held on a rent variable, and therefore subject to enhancement.

The other material issues in each suit were:—

1st. Whether the claim of the plaintiff was barred by the Regulation of Limitation; and

2ndly. Whether the notice, required by law as a preliminary to a suit for enhancement of rent, had been duly served.

The five suits were heard together by the Principal Sudder Ameen of Zillah Backergunge on the 20th of January 1858. His decision, which is at page 188 of the Appendix, was in favour of the appellant on all points. The defendants in each suit appealed to the Zillah Judge (Mr. Kemp), who, on the 17th of July 1858, reversed the decision of the Principal Sudder Ameen, and decided in favour of the defendants. His judgment, which is at page 215 of the record, proceeded on the ground that the defendants had established by evidence that each talook had paid a fixed and invariable rent for more than twelve years anterior to the Perpetual Settlement, and was consequently not liable to further assessment.

The appellant then carried the five causes to the Sudder Dewanny Adawlut on special appeal, upon the grounds stated at page 218 of the Appendix.

These seemed to have resolved themselves into the objection:—1st, that the Judge, having determined that the suits were barred by the Regulation of Limitation, was in error in afterwards going into the merits of them; and 2ndly, that he was in error in holding that a suit for enhancement of rent must be brought within twelve years from the date at which the plaintiff's title accrued.

The judgment of the Sudder Court, which is at page 223 of the Appendix, dismissed the special appeal on the ground that the Judge had, in fact, decided the suits not on the question of limitation, but upon their merits, and that his decision, being one of questions of fact, could not be reviewed by that Court on special appeal.

Their Lordships, in dealing with the present appeal, will assume that the appellant's claim is not barred by lapse of time, and that he has duly served the notices

required by law. These points appear to have been decided below in his favor, and their Lordships see no ground to doubt the correctness of that decision. They propose then, to confine their attention to the question whether it was sufficiently proved in the Courts below that the present talook had been held at a fixed and invariable rent for more than twelve years antecedent to the Perpetual Settlement; it being admitted that, as the law stood in 1858, the burthen of proving this lay on the defendants.

The principal documents on which the defendants rely in support of their title are the settlement of the 21st of Srabun 1162, at p. 177; the *Kharijee Likhons*, or "mutation papers," of the 16th and 26th of Bysack 1164, at pp. 51 and 125; the similar document of the 13th Joistee 1169 at p. 97; the four *Bundobusts*, or settlements of the 11th and 14th Joistee 1174 at pp. 64, 96, 125, and 179; the *Furud* of 1198 at p. 49; the petition of 1810 at p. 58; the *Dakhilas* or receipts for rent at pp. 65 to 68; those at pp. 96 to 105; those at pp. 126 to 132; those at pp. 150 to 158; and those at pp. 177 to 185 of the Appendix. The "mutation paper" of Choitro 1214 at p. 149, bears only on the partition in 1807, between the sons of Beeshtodeb, and the titles of the defendants in the 4th and 5th suits.

What then is the effect of the documents if taken as genuine? The first establishes the existence of the dependent Talook Ram Chuckerbutty in the year 1755; the two next prove the division of that Talook into three in the year 1757, and the further sub-division of one of these into two in 1765. But all these fail to show that these talooks were held at a fixed and invariable rent.

The first is at least consistent with the hypothesis that the rent of the parent talook might vary with the amount of land brought under cultivation; the others import that the rent of each of the four derivative talooks was not to be settled until after survey and measurement. On the other hand, the four bundobusts or settlement papers of 1174, if genuine, prove that in 1767, A. D. the rent of each of the four talooks became fixed and invariable; and the dakhilas support the contention of the defendants that they and their predecessors had ever since continued to hold their lands at these rents. The *furud* shows that in 1792, and the petition shows that in 1810, the zemindar for the time being recognised the bundobusts of 1174, and admitted the title of the defendants. Unless, therefore, this evidence can be successfully impeached, it seems fully to warrant the conclusion of the Zillah Judge that the defendants had relieved themselves of the heavy burthen which the law cast upon them, and established the immunity of their lands from further assessment.

Before, however, considering the objections taken to the genuineness or credibility of the defendant's evidence, their Lordships desire to notice the objection taken by the Attorney-General, to the effect that these documents, if genuine, contain no "words of inheritance" (to use the English phrase), *i. e.*, no expressions importing the hereditary character of the alleged tenures. Their Lordships conceive that this objection, which does not appear to have been taken in the Courts below, is not open to the appellant in these suits. He is not suing for the recovery of the lands, or to disturb the possession of the defendants, in which case he might have been successively met, and no doubt would have been met, by a plea of the Regulation of Limitation. His suits are for the enhancement of rent. The pleadings consequently admit the existence of the tenures, and the lawful occupation of the defendants. The only question between the parties is, whether the talooks are *tashkis* or *mokurruree*, *i. e.*, whether they are held at a variable or at a fixed and invariable rent. Moreover, if the objection were open to the appellant, it could hardly prevail against the evidence which the record affords that, for upwards of a century, these talooks have been treated as hereditary, and, as such, have both descended from father to son, and been the subject of purchase. It may further be observed that in the mutation papers of 1807, at p. 149, the talooks of Beeshtodeb are expressly termed "*hereditary*."

What then are the objections to the proof offered by the defendants? The first, and not the least formidable, is that based upon the fact established, if not admitted, that Syed Imamooddeen died 1192 B. of 1785 A. D. This applies directly only to the furud, and to some of the dakhilas. It affects the more material documents (the bundobusts of 1174) in so far only as it tends to deprive them of the important corroboration which they derive from the furud, if genuine, and to throw suspicion generally on the defendants' case.

It is clear that the furud bearing the seal and "Sri" signature of Imamooddeen has not been concocted recently, or for the purposes of these suits.

That it existed in 1806, and was filed with other documents in the suit before Mr. Winden, (the proceedings in which are at p. 48 of the Appendix) is shown beyond reasonable doubt. It is very unlikely that it should have been fabricated for production in that suit which was one between the talookdars and their subtenants. On the other hand, it appears that the Perpetual Settlement of the zemindary, the most important transaction in its history, was concluded several years after Imamooddeen's death in his name; though possibly without the use of his seal. This was six years later than the date of the furud. There is abundant evidence of the appearance of his seal and of his "Sri" signature upon other zemindary documents purporting to bear a date later than that of his death. If such documents have been rejected in some cases, they have been admitted and acted upon others. Weighing the evidence on both sides, their Lordships are not disposed to dissent from the conclusion of Mr. Kemp, that the date of Imamooddeen's death is not a fatal objection to the genuineness of the furud, and the dakhilas impeached on the same ground; but that all may, nevertheless, be taken to have come from the sherista or office of the zemindar.

It is then objected, as a suspicious circumstance, that though the furud was produced in 1806, the bundobusts or settlements of 1174, to which it refers, were not then produced. The answer to this is that their production was not necessary for the purposes of that suit. Documents are not produced in the Courts of India without some risk; and of all men the dependent talookdar has the greatest reason to be careful of his title-deeds, since, whatever may have been the recognition of his title by his existing zemindar, he may, at some future time, have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue.

Another objection taken to the genuineness of the bundobusts of 1174 B. is that no mention of them is made in the copy of the Quinquennial Paper for 1227 B., corresponding with A. D. 1820, which is set forth at page 20 of the Appendix. That there is some foundation for this objection, their Lordships do not deny. But the document at page 20 is not very well authenticated. Little, if any, weight seems to have been attached to it even by the Principal Sudder Ameen, whose judgment was in favor of the appellant. The inference founded on the omission to mention certain papers is not conclusive against their existence: and, indeed, there is in the last column of this Quinquennial Return a general reference to papers other than those mentioned in the preceding column. Whatever may be the force of this inference it seems too slight to out-weigh the corroborative proof of the existence of the bundobusts long before 1820, which is afforded by the furud and by the zemindar's petition at p. 58 of the Appendix.

The evidence that has been given on either side to prove or to disprove that the enjoyment of the talook has been consistent with the hypothesis that the tenures were mokurruree, remains to be considered. The earlier dakhilas produced (the objection to such of them as are subsequent in date to the death of Imamooddeen having already been disposed of) prove that for upwards of twelve years, prior and up to the Perpetual Settlement, the talooks were held and enjoyed at the fixed rent specified in the several bundobusts. So far, then, the defendants have given the proof which the Regulations require from them. But then it is objected that

Jumma wasil bakree papers produced by the appellant show that at a subsequent period the rents were variable. These papers are at pp. 90 to 95, and pp. 122 to 125 of the Appendix. They are for various years between the year 1203 and 1216, and purport to show the collections in these years made either by the Receiver appointed by the Court of Wards during the minority of the zemindar, or by a lessee named Mozoomdar. They do not mention the talook Sheeb-Kant Chuckerbutty, which is the subject of the first suit; and the title of the defendants in that suit is, therefore, unaffected by them. It is perhaps for that reason that so little notice of them is taken by Mr. Kemp in his judgment. On the other hand, if genuine, they do show that during these years rents higher than those which the defendants contend to be fixed or invariable were demanded and realized in respect of the other talooks, and that those rents were to some degree variable in amount. But all these accounts appear to be of a date earlier than 1810. In that year, it appears from the zemindar's petition at p. 58, the talookdars remonstrated against certain exactions to which they had been subjected, asserted the title which their successors now assert, and obtained a recognition of it from the then zemindar. There is no evidence that since that time the rent paid in respect of any of the talooks has varied; and it is shown that for fourteen years after he had full notice in the proceeding before Mr. Knott, at p. 50 of the Appendix, that the defendant relied on the alleged settlement of 1174, the appellant continued to receive the rents so fixed without seeking to enhance them. The conclusion, therefore, to which their Lordships would come upon the evidence is that, between 1768, and the date of Perpetual Settlement, the enjoyment of these talooks was consistent with the bundobusts of 1174; that it has been equally so since 1810; and that, if higher and varying rents were exacted in respect of any of the talooks during the period covered by the jumma wasil bakree papers, such exaction was wrongful, and was remedied in 1810, when the recognition of the zemindar remitted the talookdars to their original rights. This argument assumes the genuineness of the jumma wasil bakree papers as to which there may be some doubt. They are certainly inconsistent with the dakhilas for those years produced by the defendants.

On the whole, their Lordships, though laboring under the disadvantage of having heard only the able, but at the same candid, argument for the appellant, have failed to find any sufficient grounds for disturbing the judgment of the Court below upon a pure issue of fact. The order, therefore, which they must humbly recommend Her Majesty to make, is that this appeal be dismissed.

The 29th March 1865.

Present at the hearing of the first Appeal on the 23rd, 24th, and 26th March 1863:

: Lord Kingsdown, Sir J. T. Coleridge, Sir E. Ryan, Sir L. Peel, and
Sir J. W. Colvile.

Present at the hearing of the second Appeal on the 1st and 2nd March 1865.

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel,
and Sir J. W. Colvile.

**Limitation—Purchaser at sale for arrears of Revenue—Shikmee Talookdars—
Onus probandi—Registration—Evidence.**

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Wise and others,

versus

Bhoobun Moyee Debia and another.

A purchased in 1833 a zemindary at a sale for arrears of Revenue under Regulation XI. of 1822, and was put into possession of the property. Within the zemindary were certain mouzahs claimed by B and C as mukurraree-holders of a shikmee talook created by the former zemindar before the Decennial Settlement.

Possession of the zemindary was ordered to be delivered to *A*, and his agent was put into possession of the mouzahs as part of the zemindary. After much litigation *B* and *C* were restored to possession of the mouzahs in 1840 and 1841.

To a suit by *A* for the recovery of the lands *B* and *C* pleaded limitation, calculating the period from the time of purchase in 1833. Held that the period of Limitation must be computed from the time when the possession was taken from the purchaser in 1840 and 1841, and not from 1833.

Lands situate within a zemindary must *prima facie* be considered as part of the zemindary; and it is for those who insist on the separation of lands from the general lands of the zemindary and on their settlement as a shikmee talook, to establish their title.

When a long series of documents is produced, showing a reasonable origin of title, nearly a century ago, a regular deduction of that title, and a possession consistent with it, confirmed by the all important fact of such possession existing at the time of the commencement of the claimant's title by purchase, the evidence of intrinsic improbability should be very strong indeed which is to counterbalance the weight of such testimony.

The registration of a talook or of the sunnuds creating it, is not absolutely necessary to prove the creation of the talook before the Decennial Settlement. The omission of any mention of such a talook in the Decennial or Quinquennial Settlement, and the inclusion of the lands in the Decennial Settlement as part of the zemindary for which the jumma is assessed, was held not to afford a strong influence against the evidence of the talook being only a shikmee talook paying rent to the zemindar; the talookdars were not required to mention it, nor was it necessary for the zemindar to do so.

Discussion of the evidence requisite to establish the existence of an old shikmee talook.

IN the month of December 1833, a zemindary, called Tuppah Cooreekhuy, in the Collectorate of Zillah Mymensing, was put up for sale by public auction, to satisfy arrears of Government Revenue under Regulation XI. of 1822.

It was purchased by or on behalf of Bhojany Achargee Chowdry, and it is not disputed that the purchaser acquired whatever rights in the zemindary belonged to the zemindar at the time of the Decennial or Perpetual Settlement. He was entitled to the immediate possession of such lands as at the time of the sale were in possession of the zemindar, and he had a right, under the Revenue Sale Law, to set aside by suit all sub-tenures created since the Decennial Settlement by the zemindar,* or any of his ancestors.

Within the zemindary were certain mouzahs which, or portions of which, are the subject of the two suits now in appeal. These suits relate to different parts of the same property, are between the same parties, depend on the same evidence, and are substantially one suit.

The mouzahs in question were alleged by persons now represented by the appellants to form a shikmee talook created before the Decennial Settlement; held of the zemindar by mokurruree tenure, *i. e.*, at a fixed rent not liable to alteration.

The purchaser on the other hand, whose interests are now represented by the respondents, insisted that these mouzahs were part of the zemindary, and were held khas by the zemindar at the time of the sale, and that the purchaser, therefore, became entitled to them. Possession of the zemindary was ordered to be delivered to the purchaser, and his agent was put into possession of the lands in question as part of the zemindary. His possession, however, was disputed on the grounds already stated by the persons claiming as talookdars, who insisted that they were in possession of the lands in that character at the time of the sale. After much litigation, the Sudder Court was of opinion that the talookdars had been in possession at the period in question, and ordered the possession to be restored to them, the purchaser being left to institute a regular suit to set aside such possession.

Under this order the persons claiming as talookdars were put into possession of part of the land in dispute in December 1840, and of the rest early in 1841, as appears by certain dakhulnamahs in evidence in this case.

This decision left the right undetermined, and settled only the question of possession, and it became necessary for the purchaser of the zemindary, if he meant to institute any suit for the recovery of the lands, to institute it within twelve years from the time. But about this time, that is, in the year 1840 or 1841, Cowdhry the purchaser died, leaving a widow, and the widow and the mother of Chowdhry became his representatives. The widow, as she alleges, under a will made by her husband

* *Qy.* Defaulting zemindar.

had power to adopt, and adopted, a son, and neither the validity of the will nor the fact of adoption is in controversy in this case. She instituted a suit in 1853 for the recovery of this property, which failed upon merely technical grounds for want of sufficient Stamp on the proceedings, or for some such reason. In 1855 the first suit now under appeal was commenced. As regards any bar arising from the Statute of Limitations, this suit must be treated as if it had begun in 1853.

The appellants, in their pleadings, insist that the period from which respondents' obligation to sue commenced is to be calculated from the time of the purchase in 1833, and they, therefore, insist on the Regulation for the limitation of actions in bar of the present claim; but they do not, by these pleadings, insist on such bar if the period is to be calculated from the time when the possession was taken from the purchaser in 1840 and 1841; and we are clearly of opinion that this is the period from which the time must be computed. The death of the purchaser and the minority of the heir would clearly take the case in that view out of the Statute of Limitations. The rights of the parties, therefore, must be decided on the merits.

The real question, which is one of some difficulty, is whether the lands in question were constituted a talook previously to the Decennial Settlement in 1790-91, by the then zemindar, as alleged by the appellants, or whether they were at that time held khas by the zemindar as part of his zemindary, as alleged by the respondents.

The title set up by the appellants is this: they allege that the lands in question were granted by Ghous Khan, the then zemindar, by two sunnuds, one dated, in 1779, and the other dated in 1784, at a fixed rent to his sister Amina Beebee as talookdar, in mududmash, or for her maintenance at a fixed rent.

If these documents be genuine, there seems to be no reasonable doubt about the appellant's right.

The Judge in the Zillah Court, was of opinion that they are genuine, and he therefore dismissed the respondent's suit.

The Sudder Court on appeal, was of a different opinion, and made a decree in favor of the respondents.

The first of these suits was heard before us on appeal, in February 1863. It appeared that the second suit was coming on for hearing, and we were of opinion that it might be material to see some of the original documents, and also to consider other evidence not at that time before us, and we, therefore, directed that the decision on the first suit should be delayed till the second had been heard, and that the sunnuds relied on by the appellants should be sent over to this country.

Some additional evidence has been printed, and the papers purporting to be the original sunnuds have been sent over, and the question now to be determined is whether, upon the whole, the appellants have sufficiently established their case.

It is not disputed by the appellants that these lands, being situate within the zemindary purchased by the respondents, are *prima facie* to be considered as part of the zemindary, and it is for them, the appellants, who insist on the separation of these lands from the general lands of the zemindary, and on their settlement as a shikmee talook, to establish their title.

To prove their case, they produce papers purporting to be the two sunnuds to which we have already referred.

Nothing has been pointed out to us in the appearance of these papers throwing any suspicion upon them, nor have we been able to discover anything which does so.

We have three deeds of sale, by Amina Beebee, and persons purchasing from her, professing to convey different portions of the lands as parts of a talook. One of these deeds is dated in 1808, and another in 1821.

There are produced two other sunnuds, one purporting to be dated in 1812, by Asheena Beebee, the then zemindar, to Aymun Beebee (a purchaser from Amina),

and another in 1815 by Ibrahim Khan, the then zemindar, to Khosh Khuddum, a purchaser of a part of this talook from Aymun Beebee. These sunnuds purport to recognize and confirm the title of the purchasers.

In proof that Amina Beebee had possession of these lands as a talook, in conformity with the sunnuds granted, we have *chittahs* or measurement papers, signed by Ameens employed on behalf of the zemindar, to measure the lands of the zemindary in the years 1787, 1788, 1789, 1790, 1791, and 1792. These chittahs describe the lands as the talook of Amina Beebee.

We have further the detailed accounts of the agent in receipt of the rents of these lands in the year 1790, describing them as the talook of Amina Beebee.

There are other measurement papers or chittahs affording the same evidence in the years 1807 and 1816.

There are then produced dakhilas or receipts for rent on behalf of the zemindar for the talook of Amina Beebee in the years 1780, 1805, 1817, 1820, and 1828.

Several other documents are in evidence showing, if they be genuine, the same fact that, at an early date and before the Decennial Settlement, a shikmee talook had been constituted in favor of Amina Beebee at a mokurruree jumma; and that the lands included in it were held by her, or persons claiming under her, up to the time or nearly up to the time of the sale of the zemindary in 1833.

It was established by the order of the Court restoring the appellants to the lands in the year 1840, that they were in possession of them at the time of the sale: for the order was made entirely upon that ground and decided nothing as to the title.

Against this great body of evidence there is really nothing which can be called evidence on the part of the respondents; but they allege, and undertake to show, that all the documents relied on by the appellants are forgeries.

A long experience in Indian appeals has, no doubt, satisfied us that the presumption in favor of the genuineness of documents offered in evidence in that country is very weak; but still it must not be held that the presumption is in favor of forgery; and when a long series of documents is produced, showing a reasonable origin of title nearly a century ago, a regular deduction of that title, and a possession consistent with it confirmed by the all-important fact of such possession existing at the time of the commencement of the respondents' title by purchase in 1833, the evidence of intrinsic improbability should be very strong indeed, which is to counterbalance the weight of such testimony.

Still, circumstances may be sufficiently strong for this purpose, and they have been held to be so in this case by the Judges of the Sudder.

We will remark upon the principal of these circumstances; but it is material to consider them with reference to the case set up by the respondents.

The case set up by him is shortly and accurately stated in the judgment of the Sudder Court in these terms:—

“The general allegation of the plaintiff is that Ibrahim Khan, the proprietor of the zemindary, up to the time of the revenue sale, fraudulently set up this talook for his own benefit, for which purpose he has found it convenient to use the names of his relations and connections Aymun Beebee (one of the alleged purchasers from Amina) being his wife, and Amina Beebee, the professed talookdar of the sunnuds of 1186 (1779) and 1191 (1784), being his aunt and the sister of the then zemindar Ghous Khan.”

If this case be true, no doubt the sunnuds purporting to create this talook half a century before the sale, and the various documents long before the sale referring to it, must be forgeries. On the other hand, if these documents be genuine, then the respondent's case must be untrue.

No direct evidence is offered against the genuineness of the sunnuds: but it is said that they cannot have been made at the time when they bear date, for several reasons, of which these are the principal:—

First, it is said that the talook is not mentioned in the Decennial or Quinquennial Settlement as such, and that the lands are included in the Decennial Settlement, as part of the zemindary for which the jumma is assessed on the zemindar.

We have not before us the particulars of these Settlements ; but assuming the statements to be accurate, the fact does not seem to afford any strong inference against the existence of the talook.

If it had been an independent talook it would have been liable to direct assessment by the Government, and would have been the subject of assessment on the talookdar ; but being only a shikmee talook paying rent to the zemindar, the talookdars were not required to mention it, nor was it necessary for the zemindar to do so.

It is then said that if the sunnuds and the various instruments by which conveyances of portions of the talook are alleged to have been subsequently made, had been really executed, those instruments, or at all events, some of them, would have been registered, and that none of them have, in fact, been registered.

No Regulations have been pointed out to us by which the registration of these sunnuds, or of this talook (created, if at all, before the Decennial Settlement) was made necessary ; and though the observations of the Judges of the Sudder " that the deeds want the authentication which registration would have afforded," and " that the talook wants the corroboration which registration and its mention in the Quinquennial papers would have afforded," be perfectly well founded and entitled to weight, it must be considered whether, without this evidence, the proof be not sufficient.

A circumstance more strongly relied on by the respondents' Counsel was this, that these sunnuds were never produced nor mentioned by the appellants on several occasions on which, it is said, if they had really been in existence at that time, they ought to have been produced, and certainly would have been produced.

First, it is said that a litigation went on from the time of the sale in 1833 up to the year 1840 with respect to the possession of these lands, and that in the course of that suit no allusion was made to these documents. But the answer given to this objection much diminishes its force, *viz.*, that the question then before the Court was not one of title but of possession, and that it was only on the question of title, as to which the Court had no power in that suit to pronounce any decision, that the production of the original sunnuds was of importance. Though these sunnuds were not produced, the title under them was asserted, and the sunnud of confirmation of 1813, from Asheena Beebee to Aymun Beebee, seems to have been actually produced on the 2nd of July 1839.

Another objection which was much pressed at our Bar was this :—

These sunnuds describe the lands as lakheraj and mududmash, whereas it is said that they were not alleged to be lakheraj at the time of the Decennial Settlement, but were included in the lands subject to assessment ; and that it was not till a much later period (not very long before the sale) that they were claimed to be lakheraj, and that these instruments must, therefore, have been fabricated after that claim had been set up.

Now, the force of this argument depends on the allegation that these lands were not claimed or pretended by the then zemindar to be lakheraj before the Settlement. But of this we find no sufficient evidence. It is well known that before that time, and especially about that time, a great number of fictitious claims to exemption from assessment of lands as lakheraj were set up by different proprietors, and although it was held in what is called the alluvion suit that the lands were not, in fact, lakheraj, and that the firman of the Sultan purporting to make them so had been forged by Ibrahim Khan, yet that fact by no means shows that at the dates of these sunnuds the then zemindar did not claim or pretend them to be so. Whether they were or not included in the assessment was a question depending on the description contained in the Decennial Settlement ;

and though the Government Officer was satisfied after much enquiry that they were in fact covered by the assessment, such descriptions are generally vague and uncertain, and the difficulty of identifying lands is greatly increased in a long lapse of years when it appears that the lands adjoin the great River Burhampooter, and are subject to be submerged, and have their boundaries changed by not unfrequent overflows or changes in the course of the stream.

The last objection which we think it necessary to notice, and to which we confess, we are inclined to attribute the most weight is that in 1836, Mr. Glass, the partner, as we understand it, with Mr. Wise, one of the present appellants, insisted upon a title to a portion of these lands under a lease alleged to have been granted to him by Ibrahim Khan, the late zemindar, whereas Mr. Wise now claims under a purchase subsequently made by him and Glass from Aymun Beebee in 1840, and insists that Ibrahim Khan was never in possession of the lands, and that they were not part of the zemindary, except as being part of a dependent talook.

Undoubtedly these two titles are inconsistent; but it is not impossible that Mr. Glass might first procure a lease from Ibrahim, supposing him to be the owner, and might afterwards, when the title of the talookdars was insisted on and seemed likely to succeed, make a purchase from them in order that they might, under any circumstances, be secure in the enjoyment of his Indigo plantations.

The probability of this being so is strengthened by the statement in the petition of Glass to the Sudder Court in 1838, in which he alleges "that he had from a long time been making Indigo cultivation on the lands after making ijara pottahs of them from the proprietors, i. e., talookdars and zemindars."

We are very far from thinking that the various objections thus made to the title of the talookdars, and so ably urged at our Bar, are without force. But against them we must set the evidence produced by the appellants in confirmation of their title.

Now, any evidence which proves the existence of this talook at a period antecedent to that at which the respondents allege it to have been falsely set off by Ibrahim Khan, tends, more or less, strongly to disprove his case. The appellants' evidence upon that point seems to us very strong.

In 1819 there is a proceeding in the Appeal Court of Jehangur Nuggur, in which the question was, whether certain lands belonged to this talook or were part of the khas lands of the zemindar.

In 1824 we have a petition from a person complaining that Khosh Khuddum had agreed to sell to him a portion of his talook, but had refused to perform his contract.

In 1833 we find an order made in a suit which had been instituted in 1831 by Aymun Beebee against her husband Ibrahim Khan, by which a part of the lands of this talook was ordered to be sold to satisfy fees due to the pleaders.

In 1843 we find it stated upon the result of an enquiry then directed by the Civil Court of Mymensing, that when the talook was about to be sold, the plaintiff's mooktear deposited in the Treasury of the Collectorate the sum demanded.

These proceedings are very important not only because they show that in 1833 a portion of this talook was dealt with by the Court as the property of Aymun Beebee, but because it makes the supposed collusion between Ibrahim Khan and his wife Aymun, which is essential to the respondents' case in the highest degree improbable.

That the sunnuds in question have not been fabricated since the institution of these suits is clear from the proceedings in the suit with the Government as to the alluvion lands, which are of great importance.

It appears that some time before 1843 a tract of land which had been covered by the waters of the Burhampooter was left dry by some change in the stream. This tract was within the limits of Cooreekhuy. If these were new derelict lands they would be subject to assessment to the Government; but it was insisted by the purchaser

of the zemindary and the talookdars that they were lands which had originally been part of the zemindary, had been submerged and again left dry ; the zemindars insisting that the lands were part of zemindary, the talookdars insisting that they were a part of their talook.

After some proceedings in other Courts, which failed from some irregularity a proceeding was instituted by the Government in the office of the Collector of Myensing under Regulation XI. of 1819, for the purpose of determining the right of the Government. To this proceeding Ibrahim Khan the present respondent, Bhoobun Debia, and the appellants Aymun Beebee and Khosh Khuddum, were parties.

A great deal of evidence was gone into, and amongst other documents the sunnud of 1779 now relied on, and some of the chittahs and other papers produced by the appellants in this suit were put in by them, and the same case which they now set up was stated and insisted upon.

Whether the other sunnuds now produced by the appellants, and all the other papers were produced, we cannot clearly make out.

The sunnud of 1779 was the subject of investigation at that time, and it appears by the order made in the proceeding, and which dismissed the claim of the Government, that on the 5th of April 1845, in order to attest, as it is called, (meaning no doubt, to test the genuineness of) the aforesaid sunnud of 1779 (which seems to have been disputed), the Record-keeper was directed to produce any other papers which might tend to show the truth, and the witnesses named by the defendants to prove their case were summoned.

It is then stated that subsequently thereto the Record-keeper filed a kyfeut, stating that, along with the papers of Natoora Mehal of Tuppah Cooreekhuy, has been found a sunnud sealed by Mahomed Ghous, and signed by him in the Persian character ; and that the seal and Persian character thereon tally with the Persian character and seal on the sunnud filed in this case. It is then stated that Aymun Beebee produced some chittahs and a terij and jumabundy and produced witnesses who deposed that Amina Beebee had in the year (worm-eaten) acquired a sunnud of the talook of these mouzahs from Mahomed Ghous, zemindar, had held possession since that year, and sold the same ; and that in proportion to the said shares Khosh Khuddum, Aymun Beebee, and Messrs. Wise and Glass, paid the rents of the talook and held possession.

Now, it is said that the only question in that case was as to the right of the Commissioner to assess the lands as to which all the defendants had a common interest ; and that as co-defendants, the respondents could not have disputed the evidence of the appellants if they had had any interest to do so.

This may be true, although it is not easy to perceive why any enquiry into the truth of the talookdar's title, or the genuineness of the documents produced in support of it, should have been made, unless some contest on the subject had taken place between the zemindars and the talookdars. But at least, at this time (in 1845), the respondents having been turned out of possession in 1840 on the grounds which we have stated, had full notice of the title set up by the appellants, and of the evidence by which it was to be supported, and were bound to bring forward their claim in reasonable time. Yet these suits are not instituted for several years ; any then, after every opportunity had been afforded of giving evidence to disprove these documents, no direct testimony against them is produced, and many of the witnesses who were examined in 1845 may very probably be dead or not forthcoming. We have already expressed our opinion that, for the reasons which we have stated, the respondents' claim is not barred by the Statute of Limitations, but much allowance must be made for the difficulties which they have imposed on the appellants by so long delaying a suit in a country where documentary evidence is peculiarly liable to destruction or effacement, as appears by the papers in this case.

Upon the whole, we must humbly advise Her Majesty to reverse the decrees complained of, and to restore the decrees of the Sudder Ameen; and we think that all the costs of these suits, subsequent to the last-mentioned decrees, including the costs of these appeals, must be paid by the respondents. We have thought it right to go at so much length into the circumstances of the case, because we are at all times extremely reluctant to reverse a unanimous judgment of the Court below on a question of fact, and because it is due to those learned Judges to show that we have not done so without having carefully considered and weighed the evidence.

The 29th March 1865.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colville.

Res Judicata—Section 16 Regulation III. of 1793 (applicable to what cases)—
Recovery of money paid under decree or judgment.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Doorga Purshad Roy Chowdry,

versus

Tara Purshad Roy Chowdry.

(By Revivor after their decease.)

Shama Purshad Roy Chowdry and others,

versus

Hurro Purshad Roy Chowdry and another.

Section 16 of Regulation III. of 1793 applies only to cases in which the question to be determined in the cause is the same as has been already heard and determined, not to cases in which new circumstances have intervened and altered the nature and character of the question to be determined.

Money recovered under a decree or judgment cannot be recovered back in a fresh suit or action, whilst the decree or judgment under which it was recovered remains in force. But this rule of Law rests upon the ground that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought to be refunded, and is recoverable either by summary process or by a new suit.

THE fact of this case, so far as it is necessary to refer to them, lie in a narrow compass.

In the year 1821, Doorga Purshad, claiming to be entitled to the estate of his uncle, instituted a suit against Shama Purshad Nundy, a debtor to the uncle's estate, for recovering the sum of 23,024 rupees, principal and interest, due upon a bond. Pending this suit, and in the year 1827, Tara Purshad, the original respondent, sued Doorga Purshad for recovering one-half of the estate of the uncle, to which he (Tara Purshad) claimed to be entitled.

In the year 1829, there was a compromise of the suit instituted by Tara Purshad against Doorga Purshad, under which compromise Tara Purshad became entitled to a six anna share of the debt due from Shama Purshad Nundy. Subsequently to this compromise, and on the 27th July 1829, Doorga Purshad obtained a decree in the Provincial Court against Shama Purshad Nundy for the amount of the principal and interest due upon the bond. From this decree Shama Purshad Nundy appealed to the Sudder Court, and pending this appeal, and in the year 1831, there was a compromise of this suit also, which was effected by deeds dated the 16th May 1831. The terms of this compromise were, that Shama Purshad should pay 24,217 rupees 12 annas 17 gundahs at the end of three years without interest, and that, in default of payment, Doorga Purshad should be at liberty to proceed and

realize the amount. This compromise was, it appears, made without the privity of Tara Purshad, and the payment stipulated to be made by Shama Purshad Nundy at the end of the three years was not made by him.

In this state of circumstances Tara Purshad, in the month of March 1835, instituted another suit against Doorga Purshad, seeking to recover from him his (Tara Purshad's) 6 anna share of Shama Purshad Nundy's bond-debt, and of the interest upon it up to the time of the commencement of the proceedings against Shama Purshad Nundy in the year 1821; and by his plaint in this suit Tara Purshad reserved to himself the right to bring another suit for his share of the interest on the bond-debt from the last-mentioned date up to the date of the decree of the 27th July 1829, which Doorga Purshad had obtained as above-mentioned.

This suit was carried through the Courts in India up to the Court of Sudder Dewanny Adawlut, and ultimately by a decree of that Court, dated the 15th April 1841, Doorga Purshad was decreed to pay to Tara Purshad the entire amount of principal and interest for which his suit was brought. From this decree of the Sudder Court Doorga Purshad appealed to Her Majesty; and upon this appeal being heard before this Committee in July 1849, the Committee reported to Her Majesty that the decree of the Sudder Court ought to be reversed, and that it ought to be declared that Doorga Purshad was liable to Tara Purshad for a 6 anna share of what he, Doorga Purshad, had received, or might thereafter receive, and of what, if anything, he might at any time after the 16th May 1834, (being the expiration of the time limited by the deeds of compromise of the 16th May 1831), without his wilful default, have recovered or received from Shama Purshad Nundy, for or in respect of the sum of 24,217 rupees 12 annas 17 gundahs, and the interest thereon, payable by Shama Purshad Nundy, under the decree of the 27th July 1829, and the compromise of the 16th May 1831; and that the case ought to be referred back to the Court of Sudder Dewanny Adawlut, to ascertain, carry out, and enforce the rights and liabilities of the parties as above declared; and that Tara Purshad should be at liberty to apply in the cause of Doorga Purshad against Shama Purshad Nundy for leave to enforce the decree in that cause as he might be advised for the recovery of his 6 anna share of the said 24,217 rupees 12 annas 17 gundahs, and interest in so far as the same had not been already recovered. By an order of Her Majesty in Council, bearing date the 18th July 1849, this report was proved, and it was ordered that the decree of the Sudder Court of the 15th April 1841, should be, and the same was thereby reversed, and that it be declared and done as in the report more fully set forth and recommended; and that the same be duly and punctually obeyed, complied with, and carried into execution.

In the meantime, pending this appeal to Her Majesty, and on the 3rd December 1842, Tara Purshad instituted a further suit against Doorga Purshad to recover the sum of 4,593 rupees 12 annas 9 pie, the interest upon his 6 anna share of the sum secured by the bond from the year 1821, when the proceedings against Shama Purshad Nundy were commenced, up to the 27th of July 1829, when the decree against him was made, being the interest for which by the plaint in his original suit he had reserved to himself the right to sue. This suit was heard before the Principal Sudder Ameen on the 11th of August 1843, and by his decree of that date he dismissed the suit; but, upon an appeal by Tara Purshad to the Judge of the Zillah Court, the decision of the Sudder Ameen was reversed, and Doorga Purshad was ordered to pay to the respondent the 4,593 rupees 12 annas 9 pie, with interest at 12 per cent per annum, from the time of the commencement of the suit, and with the costs in both Courts; and upon a special appeal by Doorga Purshad to the Court of Sudder Dewanny Adawlut, that Court dismissed the appeal with costs. In consequence of these decrees, Doorga Purshad was compelled to pay to Tara Purshad the sum of 11,127 rupees 15 annas 3 pie, which he accordingly paid as follows:—8,200 rupees 7 annas 3 pie on the 28th April 1845 and 2,927 rupees 8 annas on the 4th August 1857.

Several attempts appear to have been made by Doorga Purshad, after Her Majesty's order in Council arrived in India, to obtain a review of the decrees made against him in the last-mentioned suit, and to have those decrees considered in connection with Her Majesty's order in Council, but failed in these attempts; and thereupon, on the 17th of August 1857, he instituted against Tara Purshad the suit out of which the appeal before us has arisen. By his plaint in this suit he has sought to recover the sum of 23,294 rupees 9 annas 16½ gundahs, being the amount of the sums paid by him to Tara Purshad, and of the sums which he has paid for his own costs of the proceedings taken against him, with interest on such sums respectively from the respective times of the payment thereof at 12 per cent per annum. Tara Purshad, by his answer to the plaint, has insisted that the decision of the Judge of the Zillah Court in his favor in the further suit brought by him, having been affirmed on appeal by the Sudder Court, became final and could not be set aside by a new suit, and he has relied upon Section 16 of Regulation III. of 1793, as a bar to the suit. On the 29th June 1858, the case was heard before the Principal Sudder Ameen, and was by that Officer dismissed with costs. From this decision Doorga Purshad appealed to the Sudder Court: but that Court, by its decree dated the 9th May 1859, affirmed the decision of the Principal Sudder Ameen. The appeal now before us is from the decree of the Sudder Court of the 9th May 1859, and from the decree of the Zillah Court of the 29th June 1858. There is no appeal before us from either of the decrees made in the further suit instituted by Tara Purshad against Doorga Purshad, their Lordships having, in consequence of delay on the part of Doorga Purshad, refused an application made by him for leave to appeal from those decrees. Doorga Purshad and Tara Purshad have both died pending this appeal, and the appeal has been revived, and is now in force between their representatives.

The sole question to be considered upon their appeal is, whether Doorga Purshad was entitled to recover in the suit instituted by him against Tara Purshad, the sums which had been recovered by Tara Purshad from him under the decree in the suit which Tara Purshad had instituted against him; and in considering this question, it must be assumed that at the times when those decrees were made, Tara Purshad was rightfully entitled to recover the sums which were payable under them, there not being, as has been mentioned, any appeal from those decrees. Tara Purshad insisted in the Courts in India, and his representatives have insisted in the argument before us, that Doorga Purshad was not entitled to recover these sums for two reasons: *first*, that his right to recover them is precluded by Section 16 of Regulation III. of 1793; and, *secondly*, that, independently of that provision in the Regulations, money, which has been paid under a decree or judgment of a Court of competent jurisdiction, cannot be recovered in a new suit or action so long as the decree or judgment under which it has been recovered is subsisting and in force. Upon the first of these points, their Lordships have felt but little doubt. Section 16 of Regulation III. of 1793 is in these terms:—"The Zillah and City Courts are prohibited from entertaining any cause which, from the production of a former decree or the records of the Court, shall appear to have been heard and determined by any former Judge or any Superintendent of a Court having competent jurisdiction. If any doubt should arise respecting the competency of the former jurisdiction, the Judges are to report the circumstances to the Sudder Dewanny Adawlut, and wait the instructions of that Court." Their Lordships think that this provision applies only to cases in which the question to be determined in the cause is the same question as has been already heard and determined, and not to cases like the present in which new circumstances have intervened and altered the nature and character of the question to be determined. The intent of the Regulation, as it seems to their Lordship, is only to prevent the re-trial of the same question, and it is obvious that there is an essential difference between the question, whether Tara Purshad was entitled to

recover against Doorga Purshad before the order of Her Majesty in Council was pronounced, and the question whether, after that order was pronounced, he was entitled to hold the money which he had previously recovered.

Upon the second point their Lordships have felt more difficulty. There is no doubt that according to the Law of this country—and their Lordships see no reason for holding that it is otherwise in India—money recovered under a decree or judgment cannot be recovered back in a fresh suit or action whilst the decree or judgment under which it was recovered remains in force; but this rule of Law rests, as their Lordships apprehend, upon this ground, that the original decree or judgment must be taken to be subsisting and valid, until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded, the money recovered under it ought certainly to be refunded, and, as their Lordships conceive, is recoverable either by summary process or by a new suit or action. The true question, therefore, in such cases is, whether the decree or judgment, under which the money was originally recovered, has been reversed or superseded; and, applying this test to the present case, their Lordships are of opinion that the decrees obtained by Tara Purshad against Doorga Purshad were superseded by the order of Her Majesty in Council pronounced in the year 1849. It was plainly intended by that order that all the rights and liabilities of the parties should be dealt with under it, and it would be in contravention of the order to permit the decrees obtained by Tara Purshad, pending the appeal on which it was made, to interfere with this purpose. Moreover, the decrees now under appeal rest on precisely the same cause of suit as the original decree, which was reversed by the order of Her Majesty in Council. The plaint in the case on which the original decree was recovered describes the interest recovered by the decrees under appeal as part of the same cause of suit, separated only for the convenience of Tara Purshad; and the decrees under appeal, therefore, were mere subordinate and dependent decrees, and their Lordships do not think that these decrees can be held to have remained in force when the decree on which they were dependent had been reversed.

That the Court of Sudder Dewanny Adawlut has not, as their Lordships think it might have done, dealt with the decrees, now under appeal, as falling within the direction given to that Court by Her Majesty's order in Council, to ascertain, carry out, and enforce the rights and liabilities of the parties, does not, in their Lordships' opinion, vary the case. This provision in Her Majesty's order in Council gave power to the Court of Sudder Dewanny Adawlut to deal summarily with the rights and liabilities of the parties, but it could not, in their Lordships' opinion, take away any rights which the Law would give to Doorga Purshad independently of that power. For these reasons their Lordships are of opinion that the decrees appealed from ought to be reversed, and that the sums of rupees 8,200-7-3, and rupees 2,927-8 paid under them ought, so far as the assets of Tara Purshad will extend, to be re-paid by the now respondents to the appellant, with interest at 12 per cent from the respective times when such sums were respectively paid; and that the now respondents ought also, so far as Tara Purshad's assets will extend, to pay the costs of this appeal; but under the circumstances of the case, and having regard to the delay on the part of Doorga Purshad, their Lordships do not think that his representatives are entitled to recover the costs incurred by him in the course of the proceedings taken against him by Tara Purshad. Their Lordships, therefore, will humbly recommend Her Majesty to make an order upon this appeal to the effect which we have mentioned.

The 26th May 1865.

Present :

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and
Sir J. W. Colville.

**Hindoo Law—Power of testamentary disposition—English Law (not applicable)—
Wills—Adoption—Inheritance.**

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Bhoobun Moye Debia,

versus

Ram Kishore Acharjee.

The testamentary power of disposition by Hindoos has been established in Bengal by the decision of Courts of Justice. The nature and extent of such power cannot be governed by any analogy to the Law of England—the English system being one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing, as far as possible, from that which prevails amongst Hindoos in India.

A written instrument, purporting to be a deed of permission to adopt, which was registered as a deed in the life-time of the maker, and which contained no words of devise, was held not to be of a testamentary character, there appearing no intention on the part of the maker that the document should contain any disposition of his estate except so far as such disposition might result from the adoption of a son under it.

An adopted son, as such, takes by inheritance, and not by devise.

A son cannot be adopted to the great grand-father of the last taker after the lapse of several successive years when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

When the estate of a son is unlimited, and that son marries and leaves a widow his heir, she acquires a vested interest in her husband's property as widow, and a new heir cannot be substituted by adoption to defeat that estate, and take as an adopted son what a natural-born son would not have taken.

By the mere gift of power of adoption to a widow, the estate of the heir of a deceased son vested in possession cannot be defeated and divested.

The rule of Hindoo Law is that, in the case of inheritance, the person to succeed must be the heir of the last full owner. On the death of the last full owner, his wife succeeds as his heir to a widow's estate; and, on her death, the person to succeed is the heir at that time of the last full owner.

THE appeal in this case arises out of a suit brought by the respondent Ram Kishore to recover certain estates in Bengal which were claimed by and were in the possession of the appellant and of Rajendro Kishore whom she alleged to be her adopted son.

The facts, so far as they are necessary to make our judgment intelligible, are

Ram Kishore Acharjee, being the owner of considerable estates in Bengal, died in the year 1821. He left surviving him a widow named Chundrabully, and an only son named Bhowanny Kishore.

At the time of his father's death, Bhowanny, who succeeded as his heir, was about four years of age. He attained, however, his majority and married the appellant, Bhoobun Debia. He died in the month of August 1840, being then about twenty-four years old. He left no issue, and Bhoobun Debia his widow became the heir of his property, as well ancestral as of other estates, which had been purchased with his own money during his life.

Immediately upon the death of Bhowanny, an instrument was set up as being his Will by Chundrabully his mother, and Bhoobun Debia his widow. By this instrument power to adopt a son was given to Bhoobun Debia, and until such adoption was made, the income of the estates was given to Chundrabully and Bhoobun Debia.

Under this alleged Will these two ladies took possession of the estates of Bhowanny, and remained in the enjoyment of them for nearly four years.

In December 1843 Bhoobun Debia professed to exercise the power alleged to have been given to her by the instrument already referred to, and adopted a boy called Rajendro Kishore.

Upon this a quarrel appears to have arisen between Chundrabully and Bhoobun, and Chundrabully alleged that the supposed Will of Bhowanny, under which she had so long been in the enjoyment of half his property, was a forgery, and had not been made till after his death; and that Bhoobun had no power of adoption. She further set up an instrument called an *onoomuttee puttro*, or deed of permission, by which she alleged that a power to adopt a son had been given to her by her husband Gour Kishore in his life-time, and which power, in the events which had happened, she claimed a right to exercise.

She accordingly adopted, or professed to adopt the appellant Ram Kishore, as the son of Gour her late husband.

Bhoobun Debia on behalf of Rajendro Kishore her adopted son, having obtained possession of all the property of Bhowanny, the suit in which the present appeal is brought, was instituted in 1852, in the Zillah Court of Mymensing, by a next friend of Ram Kishore, on his behalf, against Bhoobun Debia and Rajendro Kishore and certain other persons, the plaintiff claiming as the adopted son of Gour the whole property, ancestral and acquired, of Bhowanny. To this suit Chundrabully was made a defendant, instead of suing as a plaintiff on behalf of her son; that course being adopted probably with a view to avoid any prejudice which might arise from the inconsistency of her previous conduct with the title now set up for her son.

When the case came before the Sudder Ameen he was of opinion that the plaintiff must recover upon the strength of his own title, and that, if such title failed, it was unnecessary to decide upon the case of the defendants.

He was of opinion that the plaintiff had failed to prove his title, and he, therefore, dismissed the suit, expressing at the same time a strong opinion in favor of the defendant's adoption.

He awarded the costs of the suit to the defendants, with the exception of Chundrabully, whom he held to be really the promoter of the suit.

From this decision there was an appeal to the Sudder Dewanny of Calcutta. The case was heard upon several different occasions. Finally, the Judges were unanimously of opinion that the adoption of Rajendro was invalid, and that the Will of Bhowanny, purporting to create the power of adoption, was a forgery. They were equally unanimous in holding that the *onoomuttee puttro* of Gour Kishore was a genuine and valid instrument, and that if the power to adopt continued at the time when Chundrabully professed to execute it, there had been a valid adoption. One of the Judges was of opinion that the power was gone, and that the adoption was invalid. The other two were of opinion that the power existed at the time of the adoption, and a decree was made, therefore, in favor of the plaintiff as to the ancestral property of Bhowanny, but not as to his self-acquired property; and the costs of the parties were ordered "to be borne by them in proportion to the amount of the property decreed or dismissed."

The case now comes before us on appeal by Bhoobun Debia, as representing her own rights and the rights of a son, whom she had adopted in lieu of Rajendro who is dead, and on a cross-appeal by Ram Kishore, complaining that the decree in his favor ought to have included the self-acquired property as well as the ancestral property of Bhowanny.

On the hearing of these appeals we expressed a clear opinion, without calling on the respondent's Counsel that the Court below was right in holding that the alleged Will of Bhowanny was a forgery. The evidence is irresistible, that it was contrived by the different members of his family after his death, in order to give effect to an arrangement which they consider would be for the common benefit. This being so, and no power of adoption having been proved or alleged to have been given by parol, the adoption of Rajendro and of the son now substituted for him, must, of course, be held in this suit to be invalid.

The next question is as to the validity of the adoption of Ram Kishore. We see no reason to dissent from the opinion of the Court below upon the facts of the

case, viz., that the *onoomuttee puttro* of Gour is a genuine instrument, and that supposing the power given by it to have been in force when the adoption under it took place, the adoption was good; but we think it unnecessary to examine into the genuineness of this instrument, as we are of opinion that, at the time when Chundrabully professed to exercise it, the power was incapable of execution.

It will be necessary to go into this part of the case with some minuteness.

It appears that some years before the birth of Bhowanny, and in the year 1811 of our Era, Gour Kishore being then childless, and anxious, as Hindoos generally are, to provide a son by adoption if he should have no natural-born son, executed an *onoomuttee puttro* on the 30th March 1811, by which he gave power of adoption to Chundrabully his wife.

In 1819, two years after the birth of Bhowanny, he executed the instrument on which the present question depends, which is found at page 51 of the Appendix, and is in these words:—

“GOUR KISHORE SURMA,

“By the pen of Ram Nursing Surma.

“To the abode of all goodness, Chundrabully Debia.

“This is an *onoomuttee puttro* (deed of permission) to the following purport:—Prior to the birth of a male child from your womb, I had executed in your favor an *onoomuttee puttro* on the subject of your receiving (an) adopted son. Subsequently, by the will of God, you have given birth to a male child. Still, having regard to the future, I have again given you permission. If, which God forbid, the male child of your body be non-existent, then you will adopt a son from my race (*gotra*), or from a different race (*gotra*), for the purpose of performing mine and your *sradh* and other rites, and for the *shoba* (service) of the gods and for the succession to the zemindary and other property; on which, if the adopted son be non-existent, which God forbid, then you shall, according to your pleasure, on the failure of one, adopt other sons in succession, to avoid the extinction of the *pinda* (funeral cake or offering); that *dattaka* (adopted) son shall be entitled to perform, your and my *sradh*, &c., and that of our ancestors, and also to succeed to the property. To this end I execute this *onoomuttee puttro*. Dated 25th Kartick 1226 B. E.”

The first question which arises is as to the construction of the instrument. It seems to have been considered by the two Judges of the Sudder Court who decided in favor of the respondent (certainly by one of them), that the document was to be regarded as a Will, and as containing a limitation on failure of male issue of the testator in the life-time of Chundrabully, of the estate of the testator to a son to be adopted by Chundrabully as a *persona designata*; and one of the Judges, in a very elaborate argument, refers to Mr. Fearn's celebrated treatise on contingent Remainders, in order to show that such a devise by the English Law would be valid. There is no doubt that, by the decision of Courts of Justice, the testamentary power of disposition by Hindoos has been established within the Presidency of Bengal; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the Law of England. Our system is one of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of state of a society differing, as far as possible, from that which prevails amongst Hindoos in India.

But their Lordships are quite satisfied that there is in this case no room for the application of any such doctrines. The instrument before us is merely what it purports to be a deed of permission to adopt; it is not of a testamentary character; it was registered as a deed in the life-time of the maker; it contains no words of devise; nor was it the intention of the maker that it should contain any disposition of his estate, except so far as such disposition might result from the adoption of a son under it. He mentions the objects which induced him to make the deed—

religious motives, the perpetuation of his family, and the succession to his property ; but it was by the adoption, and only by the adoption, that those objects were to be secured, and only to the extent in which the adoption could secure them.

The main ground of the decision in the Court below appears, therefore, to fail, and this instrument must be construed and its effect must be determined in just the same way as if it had been made in one of the provinces of India in which the power of testamentary disposition is not recognized.

How, then, is the deed to be construed when we regard it merely as a deed of permission to adopt ? What is the intention to be collected from it, and how far will the law permit such intention to be effected ? It must be admitted that it contemplates the possibility of more than one adoption ; that it shows a strong desire on the part of the maker for the continuance of a person to perform his funeral rites, and to succeed to his property ; and that it does not in express terms assign any limits to the period within which the adoption may be made. But it is plain that some limits must be assigned. It might well have been that Bhowanny had left a son natural-born or adopted, and that such son had died himself leaving a son ; and that such son had attained his majority in the life-time of Chundrabully. It could hardly have been intended that, after the lapse of several successive heirs, a son should be adopted to the great grand-father of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied.

But, whatever may have been the intention, would the law allow it to be effected ? We rather understand the Judges below to have been of opinion that, if Bhowanny had left a son, or if a son had been lawfully adopted to him by his wife, under a power legally conferred upon her, the power of adoption given to Chundrabully would have been at an end.

But it is difficult to see what reasons could be assigned for such a result which would not equally apply to the case before us.

In this case Bhowanny had lived to an age which enabled him to perform, and it is to be presumed that he had performed, all the religious services which a son could perform for a father. He had succeeded to the ancestral property as heir ; he had full power of disposition over it ; he might have alienated it ; he might have adopted a son to succeed to it if he had no male issue of his body. He could have defeated every intention which his father entertained with respect to the property.

On the death of Bhowanny, his wife succeeded as heir to him, and would have equally succeeded in that character in exclusion of his brothers, if he had any. She took a vested estate as his widow in the whole of his property. It would be singular if a brother of Bhowanny, made such by adoption, could take from his widow the whole of his property when a natural-born brother could have taken no part. If Ram Kishore is to take any of the ancestral property, he must take all he takes by substitution for the natural-born son, and not jointly with him.

Whether, under his testamentary power of disposition, Gour Kishore could have restricted the interest of Bhowanny in his estate to a life-interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider ; it is sufficient to say that he has neither done nor attempted to do this. The question is whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate, and take as an adopted son what a legitimate son of Gour Kishore would not have taken.

This seems contrary to all reasons and to all the principles of Hindoo Law, as far as we can collect them.

It must be recollected that the adopted son, as such, takes by inheritance and not by devise. Now, the rule of Hindoo Law is that, in the case of inheritance,

the person to succeed must be the heir of the last full owner. In this case Bhowanny was the last full owner, and his wife succeeds as his heir to a widow's estate. On her death the person to succeed will again be the heir at that time of Bhowanny.

If Bhowanny had died unmarried, his mother Chundrabully would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that, by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession can be defeated and divested.

The only case referred to in the argument before us, or in the judgment below, as tending in that direction, is that of Luckee Narain Thakoor, reported by Sir F. McNaghten, page 168; but it is incontestible that in that case the disposition depended wholly on the testamentary power. The authority to adopt was only subsidiary to the disposition of the property. The Will of Luckee Narain Thakoor is set forth in full in No. 5, page 9, of the Appendix to Sir F. McNaghten's Works. It is termed a Will; it appoints an executor; it disposes of the whole estate; gives various legacies; gives the residue to the child of which his youngest wife was pregnant, whether a son or a daughter, in which latter case it would obviously break the legal order of succession; and directs that at that child's death the adoption of a son shall take place. We have already said that we express no opinion as to the power of Gour Kishore to have made the disposition now insisted on by the appellant by devise of his estates; but we find no such devise in the instrument which he has executed.

An additional difficulty in holding the estate of the widow of Bhowanny to be divested may, perhaps, be found in the doctrine of Hindoo Law, that the husband and wife are one; and that, as long as the wife survives, one-half of the husband survives; but it is not necessary to press this objection.

Upon the whole, we must humbly report to Her Majesty our opinion on the original appeal that the plaintiff's suit ought to be dismissed; but inasmuch as the main expense of it has been occasioned by the appellant setting up a state of facts which has turned out to be untrue, and disputing the facts alleged by the respondent which have been established, we think that no costs should be awarded to either party of the suit or of the original appeal. The cross-appeal is wholly groundless, and we must advise that it be dismissed with costs.

The several orders and decrees complained of, so far as they are inconsistent with the above recommendations, must be reversed.

The 26th May 1865.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colvile.

Disputed Boundary—Settlement of Pergunnah Havelee—Bunkur and Phulkur rights.

Appeal from the Sudder Dewanny Adawlut at Calcutta.

Rajah Leelanund Singh,

versus

Maharajah Moheshur Singh, on his decease Maharajah Lukhmissar Singh, the Government of India, and others.

Suit concerning the boundary line between contiguous mehal's. The land in dispute (which, with the mehal's adjacent, originally formed part of a permanently settled zemindary consisting of revenue-paying

meahls, and of meahls alleged to be lakheraj, all belonging to one proprietor) was so situated that it necessarily belonged either to Havelee one of the latter, or to the contiguous rent-paying meahls. The Permanent Settlement did not define the boundary, nor was it fixed in subsequent resumption proceedings against Havelee, which ended in a temporary settlement of that mehal for twenty years. The ownership of Havelee having become severed from the ownership of the other meahls, the question of boundary arose, not as a question of revenue between the Government and a zemindar, but as one of title to land between the zemindars and proprietors of two contiguous and separate estates.

A map prepared at the time of the settlement of Havelee, after actual survey and admeasurement under the instructions of the Settlement Officers, did not contain the disputed land. A subsequent survey map attributed the land to Havelee. The effect of these proceedings was to leave somewhat doubtful the question whether the land was included or intended to be included in the settlement of Havelee, or whether it was a *twofeer* or surplus which the Government was still entitled to assess *de novo*.

Held that the decision of this suit which was instituted by the appellant, a purchaser at a sale for arrears of revenue of the permanently settled meahls, to recover 1,75,000 beegahs of land as part of those meahls, depended on the question whether the land claimed or any defined part of it was in fact, included in the Havelee Settlement, and that, in considering what was included in Havelee, the Court could only deal with the Havelee Settlement, as it stood, as (what must be deemed) a valid and subsisting settlement.

The settlement proceedings showing that the settlement was intended to be of the whole Pergunnah Havelee,—Held that, if any part was by accident not included, it could not be set right in this suit, and that for none of the purposes of the suit, could the land be deemed *twofeer*.

There being some evidence that the possession of the disputed land was with the respondent as proprietor of Havelee, and the burthen of proof, therefore, resting upon the appellant, the Court was of opinion that the latter having shown that Havelee, as settled, consisted only of the measured area of 1,23,000 beegahs, and that this was all comprised in the first map, had at least shifted the burthen of proof, and established a good *prima facie* title to recover the whole of the disputed territory.

But among the Sayers or cesses included in the settlement of Havelee, an item was entered in the settlement proceedings as “Bunkur and Boondce Meahls,” which comprised the revenue arising from certain ghauts as a part of the assets of Havelee. It was established that, during the time when all the meahls belonged to the same owner, the revenue of the ghauts had been treated by the zemindar as part of the revenue of the lakheraj mehal Havelee. These ghauts were situated beyond the limits of the measured area of Havelee, and of the settlement map. The Judicial Committee of the Privy Council, being satisfied that the settlement of Havelee comprised only the measured area and the Bunkur and Boondce meahls and the ghauts of which the same in part consisted, and not being judicially satisfied that the ownership of the revenue of the latter imported also the ownership of the whole tract of land in dispute, remanded the case for further enquiry, with a direction to enquire what was the nature and character of Bunkur and Boondce meahls and of the ghauts comprised therein, and whether they included any right or interest in the land in question or any part of it, and with a declaration that so much of the land in question as might upon such enquiry appear to be comprised in the said Bunkur and Boondce meahls or ghauts belonged to Havelee, and that the appellant was entitled to recover the residue.

The appellant having failed to prove that no part of the disputed land was included in the respondent's settlement (some portion at least being shown to belong to Havelee), and also having failed to prove by independent evidence his own right to recover the land specified in the plaint—Held that the suit should not have been determined upon that mere failure on his part to support the burthen of proof cast upon him, because the judgment would be as final and conclusive between the parties as an adjudication on the merits would be, and its effect would be to give something to the respondent which, on the evidence, belonged to the appellant's meahls.

The rights of *Bunkur* (a right of cutting wood) and *Phulkur* (a right of gathering fruits), are rights indicative of a certain dominion over the soil.

THE outline of this case is as follows—At the time of the Perpetual Settlement, the large zemindary, known as the Kurruckpore Meahls in zillah Bhangulpore, was settled with Maharajah Kadir Ali Khan, who, in or before 1790, was in possession of it. It consisted of twenty-six Pergunnahs, of which five were alleged to be and were then held as lakheraj. Of these alleged lakheraj Pergunnahs it is only necessary to specify Pergunnah Kurruckpore Havelee, which has, throughout the argument before us, been conveniently called Havelee. Of the malgoozaree or revenue-paying meahls, it is sufficient to name Pergunnahs Suhrooe, Sukrabadee, and the most important of all Purbutparrah, which was sub-divided into Tuppahs Lodhwah and Semroum, Daygee, Mullia, and Bhudra.

The settlement above-mentioned was made, as in other cases, by Pergunnahs, without any survey or measurement of the lands comprised in them; and, as this vast zemindary included a great deal of wild uncultivated mountainous and forest land, it may be supposed that, however well-ascertained may have been the boundaries of the whole, those of its component parts, or Pergunnahs, *inter se*, were not very clearly defined. The effect of the settlement was to fix permanently and for ever the revenue payable in respect of the malgoozaree, or as they are termed in these proceedings, the Nizamut Meahls, and to leave the lakheraj

mehals free from the payment of revenue, but subject to the right reserved to the Government by Regulation XIX of 1793, to resume and assess the lands, should the tenure, under which they were claimed to be held lakheraj, thereafter be found to be invalid. Kadir Ali Khan, on his death, was succeeded by his eldest son Ikbul Ali Khan, who also died some time before 1836, and was succeeded by his brother Ruhmut Ali Khan.

In 1836 the Government impeached the lakheraj title of the zemindar. Pergunnah Havelee was resumed and separately settled. The proceedings which resulted in the settlement of it will hereafter be fully considered. At present, it is sufficient to say that they began in 1836, and continued until the 9th of April 1844, when a temporary settlement for twenty years was made with the Maharanee Wujhoonissa, to whom the interest of her husband Ruhmut Ali Khan had been transferred.

Pending the proceedings for the resumption and settlement of this Pergunnah, Ruhmut Ali Khan suffered the Government Revenue on the Nizamut Mehals to fall into arrear, and these mehals were accordingly sold by public auction for such arrears, and, on the 11th of August 1840, were purchased by the appellant's father, Rajah Bidianund Singh and another person, who afterwards transferred his share to Bidianund Singh. This sale, of course, put an end to the unity of ownership of the Nizamut Mehals and of Havelee. Bidianund Singh thenceforward being the zemindar of the former, with all the rights possessed by the original zemindar at the date of the Perpetual Settlement; whilst the latter, subject to the rights of Government in respect of the revenue to be assessed thereon, continued to belong to Ruhmut Ali Khan and after him to Wujhoonissa.

In 1845, Wujhoonissa having failed to pay the revenue assessed on Havelee, that estate was also sold for these arrears, and was purchased by Maharajah Roóder Singh, the grandfather of the present respondent, Lukhmissar Singh, on the 5th of November 1845.

The estates having thus become separate, boundary disputes took place between the owner of the Nizamut Mehals or his tenants on the one side, and the owner of Havelee or her tenants on the other. It may be necessary hereafter to refer more particularly to the proceedings to which these disputes gave rise. At present, it is sufficient to say that the controversy was continuing during the proceedings of the Government surveyors engaged in making a topographical survey of the Zillah Bhaugulpore in 1846 and 1847.

It appears to have been the duty or practice of the Officers employed in this survey, to lay down the boundaries of estates or other divisions of land where there was any dispute concerning them, according to the evidence which they might find of the actual possession of the lands. In the present case they had to deal with a controversy touching the boundary line between Havelee and Pergunnah Purbutparrah, and the other Nizamut Mehals contiguous to it. The owner of the latter, on the one hand, insisted that this had been conclusively determined at the time of the settlement of Havelee by a map prepared after actual survey and admeasurement by a Captain Ellis, under the instructions of the settlement Officers. The owner of Havelee, on the other hand, disputed the accuracy of Captain Ellis's map, if it purported to be a map of the entire Pergunnah Havelee, and questioned the intention to include the whole of Havelee in that map.

The Officers of the survey, relying for the most part on the evidence which they had, or thought they had, of actual possession, came to a conclusion adverse to the appellant's ancestor, and prepared the map known in the proceedings as Captain Sherwill's map, by which upwards of 1,75,000 beegahs of land in excess of that comprised in Captain Ellis's map was attributed to Havelee, and taken out of the Nizamut Mehals, as laid down in that map. The effect of these proceedings was to leave somewhat doubtful the question whether this land was included or

intended to be included in the settlement of 1844, or whether it was a *towfeer* or surplus which the Government was still entitled to assess *de novo*.

Some further proceedings afterwards took place in the Foujdary Courts and elsewhere, touching the right to the possession of this land ; but the effect of these proceedings was to remit the appellant, or his father Bidianund Singh, to a regular suit, in which alone the title could be litigated.

The suit out of which this appeal has arisen was accordingly instituted by the appellant on the 5th of June 1851. Its object is to recover, as part of the Nizamut Mehals, the 1,75,000 beegahs of land laid down by Sherwill's map as within Havelee, in excess of the land attributed to Havelee by Ellis's map ; but the plaint divides this land in certain proportions between certain specified mouzahs, the names of which occur in the lists of the villages, comprised in Pergunnahs Purbut-parrah and Sukrabadee, which were prepared at the time of the Perpetual Settlement, or shortly subsequent to it. The defendants to the suit, the respondents to this appeal, are the Government, Maharajah Lukhmissar Singh, and some of his tenants, and they insist that the 1,75,000 beegahs of land in question properly belong to Havelee.

The suit was heard first by the Principal Sudder Ameen of Bhaugulpore, who, by his decree, dated the 9th of July 1855, dismissed the suit, on the ground that the plaintiff had failed to establish a title to recover the lands in question. This decision was based upon proceedings of the Government surveyors, and seems to imply that the land was *towfeer*.

On appeal to the Sudder Dewanny Adawlut, that Court, by a majority of two Judges to one, confirmed the decision of the Principal Sudder Ameen, but did not adopt its grounds. The two Judges appear to have held that something in excess of the lands comprised in Captain Ellis's map was included in the Havelee Settlement ; that the extent of that excess was undetermined ; and that it lay upon the plaintiff to show what he was entitled to recover, which he had failed to do. The *dissentient* Judge on the contrary, held that no part of the land in dispute was included in the settlement of Havelee, that, therefore, *ex necessitate*, the whole must be taken to form part of the contiguous Nizamut Mehals, and that the plaintiff had established his title to recover it.

According to the view, therefore, both of the affirming Judges and of the *dissentient* Judge, the decision of this suit depended on the question whether the land claimed, or any and if any what, defined part of it was included in the Havelee Settlement ; and we think that this was a correct view of the case. It was incontestible that the land in question formed part of the zemindary, which by the Perpetual Settlement was assured to Kadir Ali Khan ; but that zemindary consisted partly of the Nizamut or revenue-paying mehals, in respect of which the revenue payable by the zemindar was then finally settled, and partly of the mehals, including Havelee, which were alleged to be lakheraj, and on which, therefore, no revenue was assessed. The land in dispute is so situated that it must necessarily belong either to Havelee or to the contiguous Nizamut Mehals ; but the Perpetual Settlement unfortunately omitted to define the boundary line between Havelee and these mehals ; had it done so the question in the cause could not have arisen : since, we need hardly say, no Court would disturb what had been fixed by the Perpetual Settlement. The resumption of Havelee afforded a fresh occasion for the definition of these boundaries, even whilst both Havelee and the Nizamut Mehals belonged to the same owner ; because Government, by virtue of the resumption, acquired the right of assessing revenue upon all that lay within the boundaries of Havelee, whilst it had no right to assess any fresh revenue upon a single beegah of land within the Nizamut Mehals. Subsequent events severed the ownership of Havelee from that of the Nizamut Mehals, and the question of boundary then arose in this suit, not as a question of revenue between the Government and

a zemindar, but as one of title to land between the zemindars and proprietors of two contiguous and separate estates, the Nizamut Mehals and Havelee.

In dealing with this question it must, as we have said, be assumed that so much of the land in dispute as was not included in Havelee belongs to the Nizamut Mehals; and, in considering what was included in Havelee, the Court below could only deal, as we upon this appeal must deal, with the Havelee Settlement as it stands. For the purposes of this suit that settlement must be considered as valid and subsisting. If the boundaries of Havelee ascertained by it are at all capable of being corrected, they certainly cannot be corrected in a suit of this nature. All that we can determine in this suit is whether, according to the true construction and effect of the Havelee Settlement taken as it stands, the whole or what part of the lands in question belongs to Havelee, or the whole or what part of them is included in the lands which were the subject of the Perpetual Settlement.

In considering this question three views of this Havelee Settlement present themselves for our consideration.

The *first* is that it included, and was intended to include, the whole of Pergunnah Havelee, and that all which it did include is within the limits of Ellis's map. The *second* is that it included, and was intended to include, the whole of Pergunnah Havelee; but that some portion of what it did include lies beyond the limits of Ellis's map, and is to be found in the district of which the ownership is now in dispute. The *third* is that it did not include the whole of Pergunnah Havelee, but that, either from accident or design, the large district in question, or some undefined portion of it, was omitted from the settlement, as well as from the map, and is now what in these proceedings is called a *towfeer* or surplus.

We proceed therefore to consider the intention, extent, and effect of the Havelee Settlement proceedings with reference to these views.

The first of these proceedings is that of the 1st of July 1836 (p. 98). By it Mr. Travis, the Deputy Collector, on grounds which, for the purposes of this suit, must be deemed sufficient, decided against the claim of Ruhmut Ali Khan to hold Havelee, and the other four Pergunnahs to which we have before referred ~~as~~ *khheraj*, and affirmed the right of Government to resume and assess them.

There was an appeal against this order, pending which the Government, not being able to effect an arrangement with the zemindar as to the intermediate collections of Havelee, assumed the management of it by a tehsildar of their own appointment (p. 183). The appeal was dismissed on the 30th of November 1837, by a Special Commissioner acting under Regulation II of 1828 (p. 183), and the title of Government to assess the whole of Havelee thus became complete.

It then became the duty of the Deputy Collector or the Settlement Officer, under Regulation II. of 1819, Section 21, Clause 4, "to ascertain the limits of the land," (*i. e.*, of the whole of Pergunnah Havelee), and to fix the assessment; and various proceedings were had with this object. Most of these proceedings are found *in extenso* in the first volume of the printed record, and we must refer to the more important of them.

On the 9th of April 1838 (p. 123,) Mr. Farquharson, described as the Superintendent of the Khas Mehals, but acting as the Settlement Officer in the case, held a proceeding as to Havelee. After reciting that the *Surhudbundee* and *Rookbabundee* (the specifications of boundaries and area) were not with the record, it ordered Ruhmut Ali Khan to file a list of the villages, of Havelee, and also of Pergunnahs Suhrooe, Sukrabadee, Singhool, and Luckhunpore, Pergunnah Purbutparrah (these being doubtless, assumed to be the contiguous Nizamut Mehals), accompanied by a *Surhudbundee* thereof. It also ordered the Putwarries to file the *Surhudbundee* and *Rookbabundee* of their respective mouzahs. The object obviously was to obtain a definition, by metes and boundaries, both of the whole Pergunnah and of its component villages.

At pp. 124 and 125, we have the actual process issued in respect of Rounuckabad, a principal village of Havelee, under this order, and the return to it. The dates are 17th April and 31st May 1838.

At p. 350 there is a proceeding of the 14th April 1838 before Mr. Farquharson. It complains of the omission of a village, named Bheembandh, though part of Havelee, and that two other villages have been returned as waste, though, in fact, they were inhabited. It directs the attachment of Mouzah Bheembandh as far as Koh Marug, Tuppah Dighee, and gives other directions that are not material to the present question. It orders notice to be sent to Ruhmut Ali Khan that no settlement will be concluded with him unless he files correct jumma bundee papers.

On the 11th November 1838 (page 403), Mootee Lall, the Tehsildar appointed by Government, reported to Mr. Farquharson that two mouzahs adjoining Bheembandh, one named Goormah, the other Pakum, were west of Bheembandh in the hills, and asked for an enquiry concerning them.

This led to Mr. Farquharson's proceeding of the 23rd of January 1839 (page 414). In that, after stating that it had come to this knowledge that two villages (there called Tolahs) are situated in Bheembandh, but had not been attached, he directs the issue of a purwannah to Mootee Lall, ordering him to bring these Tolahs under collection, and to explain why they had not been resumed along with Bheembandh.

At p. 143 we have the report of Mootee Lall in answer to this order; it is dated the 8th of April 1839. It appears to be endorsed on the purwannah; and reports that, after the issue of it, Mr. Farquharson had arrived at Kurruckpore, and had given a verbal order to relinquish Mouzah Kormaha (which is obviously the same place as that previously called Goormah), and to have the survey of Kita Bakum (before called Pakum) made with Bheembandh: that afterwards a purwannah of the 23rd of March, directing a separate survey of Bakum, had arrived, and that accordingly Mouzah Kormaha had been relinquished, and Mouzah Bakum would be surveyed. On this report Mr. Farquharson has endorsed "That this be put up with the record: May 16, 1839."

Intermediately Mr. Farquharson seems to have taken the depositions of Meer Dad Khan, a former Tehsildar of Havelee, and of Bhowanny Lall described as an inhabitant of Havelee but Peshkar of Pergunnah Purbutparrah. The former was taken on the 8th of April 1839, and is at p. 125; the other was taken on the 15th of March 1839, and is at p. 141. They may have conduced to Mr. Farquharson's determination to relinquish Kormaha.

At pp. 103, 116, and 118, are detailed measurements of the lands of Mouzahs Rounuckabad, Bheembandh, and Modhobun. The second alone is dated; and as the date is the 24th of March 1839, it may be inferred that Kita Bakum, which by the report of the 8th of April is treated as about to be separately measured, was not included in this measurement.

On the 15th of April 1839, Ruhmut Ali Khan (p. 208) presented a petition, which, as we understand it, is confined to Kita Bakum as a Kita or part of his Nizamut Mouzah Bhorebhundaree. He protests against its inclusion in Havelee. The petition seems to have been presented to Captain Ellis, then engaged in surveying Havelee and making his map. He, on the 22nd of April 1839, (p. 209), directed a copy to be sent to the Settlement Officer (Mr. Farquharson), who, on the 6th of May 1839, (also page 209), directs the Officer (Ellis) to be informed that the case is pending in that Cutcherry. The decision was adverse; for at page 144 we have a further petition from Ruhmut Ali Khan, which (and as it seems wilfully) confounds Bakum with Kormaha. Alleging that the former, though relinquished, had been separately surveyed by Mootee Lall; that the measurement papers of Havelee are being prepared, and Kita Bakum inserted in the English map, and stating that he objects to take attested copies of the English map because Kita Bakum (a Nizamut

Mehal) is inserted in it. The order endorsed on this petition is dated the 8th July 1839, and is that it be rejected.

On the 14th September 1839, a summary settlement was concluded by Mr. Farquharson with Ruhmut Ali Khan for one year, *i. e.*, from 1st May 1839 to 30th April 1840; and this by a subsequent order was confirmed and extended to April 1841. (*See page 183.*)

It was during the currency of this temporary settlement that the Nizamut Mehals were sold, and Ruhmut Ali Khan's interest became limited to the resumed mehals.

It is also probable that, during the same period, Mr. Beadon began the investigation which resulted in the proposal for a Permanent Settlement, next to be considered; and that, in aid of that investigation, Captain Ellis, by his proceeding of the 30th of June 1840 (p. 123), directed "the measurement papers of the mouzahs of Havelee, filed by the Ameens, which had, on comparison with the English measurement papers, been found to correspond," to be forwarded to the Superintendent of Khas Mehals.

Mr. Beadon's final settlement proceeding is set forth from pp. 182 to 203, and is dated the 16th of December 1841. It gives a summary of the former proceedings, and state that "whereas a Perpetual Settlement of that mehal (Havelee) was proper, and the mehal having been surveyed by the Revenue Surveyor (who, from the mention of his name in the next paragraph, is clearly Captain Ellis), the measurement papers are forthcoming in the Office. Hence, after enquiring into the jumma bundee, from the statements and papers of the cultivators and putwarries, a Perpetual Settlement had been, conformably to Regulation VII of 1822, concluded from the 1st of May 1841."

The proceeding then details at great length the principles upon which the Settlement had been effected. It seems sufficient to state that Mr. Beadon took the area as measured at 1,23,207 beegahs and a fraction. From this he deducted 60,433 beegahs and a fraction, as absolutely jungle, waste, and unculturable, leaving a balance of 62,774 beegahs and a fraction. This, again, when sub-divided, was found to consist of 18,998 beegahs and a fraction of land actually cultivated, and producing, or capable of producing, rent; and of 43,775 beegahs and a fraction of land which, though not cultivated, he describes as "culturable." The annual revenue derivable from the cultivated land, he estimated (*see p. 199*) at Sicca rupees 15,517, to which he added Sicca rupees 738-2, the amount of sayers or miscellaneous revenue (a description of revenue which will require further consideration), making the total revenue Sicca rupees 16,255-6. The moiety of this being, when converted from Sicca, Company's rupees 8,666 and a fraction, he fixed as the revenue payable perpetually, abandoning all further claim to revenue from either the 43,775 beegahs of culturable, or the 60,433 beegahs of unculturable, land.

It is to be observed that Bakum (spelt Bakhum) is included in the list of villages, its measured area being stated to be 129 beegahs 19 biswas. It follows, therefore, that whether the Bakum resumed by Mr. Farquharson be in Ellis's map or not (a question hereafter to be considered), its measured area is included in the 1,23,207 beegahs, the basis of that settlement.

It is further to be observed that there is no trace of Goormah or Kormaha in this or the subsequent settlement proceeding.

Again, it is to be observed that the total of the miscellaneous revenue, Sayerat, or cesses, was taken by Mr. Beadon to be Sicca rupees 738-2, of which Sicca rupees 576 consisted of rents payable by the lessees of the sayer mehal, according to the deposition of Ameen Dad Khan, taken on the 14th of March 1841, which will be found at p. 316, and the rest consisted of the sayers returned by the putwarries and ameens as specified at p. 193. We may here observe, too, that in the Sicca rupees 576 is included an item of Sicca rupees 400, payable by Rujjub Ali, as farmer of "Ghauts Marug and Kurrailee, &c.," touching which we have also his

deposition, taken on the 24th of March, at p. 317, and the Ummulnamah of 1248 (1841) at p. 318, a document which may be of some importance with reference to the present enquiry; for, whilst it gives the names of various ghauts, as proposed to be included in the lease to which it refers, it seems to indicate that the lease was to comprise, not only such tolls as may be conceived to be leviable from persons passing the ghauts, but Bunkur, which properly is a right of cutting wood, and Phulkur, a right of gathering fruit—rights indicative of a certain dominion over the soil in a given locality.

On the 16th of September 1843, Mr. Beadon's proposal of a Permanent Settlement on this basis was over-ruled by the Commissioner, who, on the 25th of the same month, made over the estate to Mr. Joachim Piron to be settled *de novo* (p. 204).

Shortly before this, and on the 13th of June 1843, the transfer of Havelee from Ruhmut Ali Khan to Wujhoonissa had taken place (p. 205).

Mr. Piron's first step was to ask whether he was to make a new measurement. He was told to test the former measurement; to adopt it if he found it to be correct—to make a new one if he found it to be incorrect (pp. 128 and 129).

Mr. Piron's general report bears date the 20th of June 1844, and is at p. 203; his settlement proceeding of the same date is at p. 334; the Doult Settlement at p. 134. The report states that he made a settlement for twenty years with Wujhoonissa, of which the other papers give the details and the principles.

His report at p. 204, also states expressly that the measurement, which he tested, was that completed under Captain Ellis: that it found it correct in every instance; and that his only objection to the former survey, regarded the classification of the various qualities of land, and the rates assessed thereon.

The result of Mr. Piron's settlement was somewhat different from that of Mr. Beadon. But it is perfectly clear that both Officers dealt with the same measured area—*viz.*, the 1,23,207 beegahs and a fraction defined by Captain Ellis. Mr. Piron, however, making a somewhat different classification of the lands, fixed the amount of revenue derivable therefrom by the proprietor of Havelee at Sicca rupees 20,678-3-17½. In this he included the sum of Sicca rupees 2,336-8-9½ for sayerat, cesses, or other miscellaneous revenue. Instead of leaving as Mr. Beadon had done, free from any direct assessment of revenue 60,443 beegahs of unculturable × 43,775 beegahs of culturable land, making together 1,03,209 beegahs of land, he excludes from assessment only 4,447 old fallow land × 35,051 rocks, with jungle × 42,586-8-4 of jungle, making a total of 82,084 beegahs and a fraction of land free from assessment.

The result of Mr. Piron's proceedings was a settlement with Wujhoonissa for twenty years at the moiety of the gross rental as estimated by him, which, when converted into Company's rupees amounted to Company's rupees 11,028-12-10.

The documents by which this arrangement was carried out with her are her petition, her kubooleut, and Mr. Piron's final order, all of the 9th of April 1844, and at pp. 135, 136, 137. In the kubooleut she describes herself as occupier of the entire Pergunnah Havelee, and says 1,23,186 beegahs and a fraction "of land of the said pergunnah have been taken by me from you under temporary settlement at an absolute sum of Company's rupees 11,128-12-10, being a moiety of the jumma, including Julkur, Bunkur, Phulkur, &c."

We stop at this point in order to state the conclusions at which we arrive from the proceedings and documents above referred to, in so far as they do not relate to the sayers or cesses or miscellaneous revenue—conclusions which, in our judgment, are no way affected by what has already appeared, or by what we shall presently state as to these sayers and cesses or miscellaneous revenue. We are satisfied from these proceedings and documents that the Settlement Officers throughout intended to resume and settle and assess the revenues of the whole of Pergunnah Havelee, and that they throughout proceeded on the assumption of the correctness of the

survey, measurements, and map made by, or under the inspection of, Captain Ellis. Looking to the great care and the minute attention which was given to the settlement of this Pergunnah, it cannot be supposed that any portion of it was designedly omitted from the settlement; and if any portion of it was omitted by accident, this is not a suit in which the accident can be set right. We think, therefore, that the third view of this settlement to which we have above referred, may, for the purposes of this suit, be laid out of consideration; and that no part of the district in question can, for any of those purposes, be considered as *towfeer* or surplus. We are also satisfied, from the evidence afforded by these proceedings, that Bakum was included, not only in the measured area of 1,23,186 beegahs, but also in Ellis's map. The objection expressed by Ruhmut Ali Khan, in his rejected petition at p. 144, to take attested copies of the map, because it included, or was about to include, Bakum is, we think, sufficient to prove this to have been the case.

Again, we are satisfied from these proceedings, and especially from the Report of Mootee Lall, at p. 143, and Mr. Farquharson's mode of dealing with that Report; and from the absence of all mention of Goormah or Kormaha in the subsequent settlement proceedings, that that village was advisedly relinquished by Mr. Farquharson as part of the Nizamut Mehals, and probably as part of Mouzah Bhorebun-dharee in Pergunnah Purbutparrah.

It may be convenient also here to add, although it has no immediate reference to the foregoing proceedings, that, from the proceedings at p. 223, the case of Mouzah Ghorakhore appears to have been solemnly decided in favor of the Nizamut Mehals; and that, in our opinion, the proceedings of the Officers of survey, at pp. 150 and 167, are not entitled to weight as against that decision. We think, indeed, that the settlement of 1844 affords the only safe criterion for determining what belongs to Havelee, and what to the Nizamut Mehals.

It results from what we have already stated that, looking at this case without reference to the sayers, cesses, or miscellaneous revenue, we should have come to the conclusion that Havelee, as settled, consisted only of the measured area of 1,23,186 beegahs; that this was all comprised within Ellis's map, and that the appellant, by showing this, had, at least, shifted the burthen of proof, and established a good *prima facie* title to recover the whole of the disputed territory; but it certainly cannot be denied that what appears upon the record before us as to these sayers or cesses, and this miscellaneous revenue, raises a very serious question whether some territory, in excess of the measured area, and beyond the limits of Ellis's map, does not belong to Havelee, and was not included in the settlement of it. It is necessary, therefore, to see how the case stands as to these sayers or cesses, or miscellaneous revenue. By Mr. Beadon's settlement the revenue derived from these sources is stated to amount to Sicca rupees 738-2, and we have already shown how that sum was made up. By Mr. Piron's settlement the sayers or cesses are stated as amounting to 2,336 rupees 8 annas 9½ pies, made up partly of the sums returned by the putwarries and ameens as the sayerat of their respective villages, and partly of sums aggregating Sicca rupees 1,116, which were not so returned; this last-mentioned item being thus entered in the settlement proceedings at p. 434:—"Bunkur and Boondee Mehals, besides the Putwarrie's paper, whatever came to light by the depositions of farmers and persons informed, and by the perusal of pottahs, &c., Sicca rupees 1,116." We have here, therefore, some at least, of these sayers or cesses described as Bunkur and Boondee Mehals; and other parts of this voluminous record contain the same or a similar description of them. We are of necessity, therefore, led to enquire what these Bunkur and Boondee Mehals really were; and to some extent, at least, the evidence leaves no doubt upon this point.

Mr. Piron has himself told us (page 342) that the Sicca rupees 1,116 was made up of Sicca rupees 785, inserted in the pottah of Peer Khan Soobahdar; of Sicca rupees 251 inserted in the deposition of Rajee Singh, son of Durshun Singh; and Sicca rupees 80 inserted in the deposition and pottahs of Posun Pasee and others.

Now, Peer Khan Soobahdar's examination, which seems to have been taken on the 20th of January 1844, is at p. 345. He is described as farmer of Mehal Bunkur and Boondée Koh Marug, and Kurrailee, &c., Pergunnah Havelee. He professes to hold, but in the name of his son Wahid Khan, Ghauts Marug, Kurrailee, Tabawee, Khuru Khataun, Hursa Poteeah, Burramupea, Shakole, and several other hills and ghauts, for the names of which he refers to the pottah, at a rent of Sicca rupees 785, and to pay therent to Ruhmut Ali Khan.

Again, at p. 346, we have the examination of Rajputtee Singh, the son of Durshun Singh, taken on the 30th January 1844, from which and the proceeding of Mr. Piron of the 26th of that month at p. 347, we learn that Durshun Singh was farmer of Mehal Bunkur, Ghaut Koolurhea, attached to Mouzah Mudloobun, Pergunnah Havelee; that he, during the subsistence of his lease, paid a jumma of Sicca rupees 251 to Ruhmut Ali Khan, who, on the expiration of the lease in April 1844, was about to bring that Bunkur Mehal under his personal collection.

The Sicca rupees 80 "inserted in the depositions and pottahs filed by Posun Pasee and others," we have been unable to trace in the record.

Again, Mr. Quintin's letter of the 19th October 1848 (*see* p. 249), refers to a variety of ghauts as included in Piron's settlement; and so far as we can see, they can have been so included only under the head of Bunkur and Boondée Mehals.

Again, it is clear upon the evidence that Ghauts Marug and Kurrailee, and possibly other ghauts held by Peer Khan Soobahdar, in the name of Wahid Khan, at the date of Mr. Piron's settlement, were, at the date of Mr. Beadon's settlement, held by Rujjub Ali, and, indeed, that the whole of the property, whatever it was, the revenue of which Mr. Beadon estimated at Sicca rupees 576, is included in the property of which the revenue was estimated by Mr. Piron at Sicca rupees 1,116.

It is clear, therefore, that Mr. Piron's settlement did include under the head of Bunkur and Boondée Mehals the revenue coming from certain ghauts, of which the most prominent are Ghauts Marug and Kurrailee, and that Mr. Piron was right in including rights in these ghauts as part of the assets of Havelee is, we think, almost proved to demonstration by the village papers in the second and third volumes to which Mr. Melvill directed our attention.

Some of these are produced by the appellant, others by the respondent, and the two classes show, with a correspondence in minute details that proves their genuineness, that long before the resumption the proceeds of these ghauts were uniformly treated by the owners of the whole zemindary as part of the revenue of the lakheraj Mehal Havelee. Against this evidence it is vain to set the award of Ruhmut Ali Khan after the date of the resumption at p. 217, or the kubooleuts, pp. 261 to 264, or the occasional entry in the village accounts of Morkhut as Marugkhat. They would at most support the theory that there may have been more than one ghaut of the same name, or different rights resulting from the same ghaut; the two former classes of evidence may, indeed, more plausibly be referred to the desire, after the resumption, to claim these ghauts for the Nizamut Mehals, which, until the sale of those Mehals, it was Ruhmut Ali Khan's interest to do.

It must be taken, then, that Mr. Piron not only included, but properly included, the revenue arising from Ghauts Marug, Kurrailee, and other ghauts in his settlement; but then the question is, what was this property; and does the ownership of it imply the ownership of any land in excess of the measured area, and beyond the confines of Ellis's map?

There is much evidence bearing more or less directly upon this point. There is the Ummulnamah, to which we have already referred, and there are the various suits and proceedings arising out of the long continued litigation concerning these ghauts.

The earliest of these proceedings which we find is at p. 393, under date the 12th of March 1842. It was before the Magistrate, (*i. e.*, in the Criminal Court) under

Act IV of 1840, and arose out of the alleged forcible dispossession of Rujjub Ali, the farmer under Ameen Buksh, of Ghaut Boondee, and Koh Marug, &c., by Munnar Rae claiming the same subjects under a pottah granted by Ruhmut Ali Khan, in his capacity of zemindar of the Nizamut Mehals. Bidianund Singh intervened in the suit, objecting that it was brought in collusion with the former proprietor of the Nizamut Mehals, Ruhmut Ali Khan. This may have been the case, but the very objection shows that there was then a dispute whether the parcels in Rujjub Ali's farm, or some of them, belonged to Havelee or to the Nizamut Mehals. The decision as to possession was in favor of Rujjub Ali.

The proceeding of the 24th of March 1841, (p. 321) before Mr. Beadon, shows that, during the investigation which led to his settlement, there were disputes between the auction-purchaser and the owner of Havelee touching certain stone quarries stated to be with the hill Mar and part of the Boondee Mehal. The report of the 21st of September 1841, (at p. 321) was obviously made in answer to a reference made in some suit arising out of the same dispute touching these ghauts, which we have been unable to trace. It shows that, as early as the 21st of September 1841, Mr. Beadon had included the ghauts held by Rujjub Ali in the settlement of Havelee.

The question whether these ghauts belonged to Havelee or to the Nizamut Mehals, continued to be litigated in one shape or another during the whole period which elapsed between the dates of the settlement by Mr. Beadon and that by Mr. Piron.

One instance is the suit of Kishna Tewarree, of which the final proceeding is that of the 12th of June 1845, which gives the history of the whole litigation (pp. 330 to 332). It began with the summary suit brought before the Collector by the naib of the auction-purchasers of the Nizamut Mehals (we presume in their names) against the plaintiff for rent. The Collector has under the Regulations no jurisdiction to entertain such a suit, unless the relation of landlord and tenant subsists between the parties. He, nevertheless, made a decree against Kishna Tewarree for the sum sued for. Thereupon Kishna Tewarree, alleging that he was not the tenant of the purchasers of the auction-mehals, but a sub-tenant of the owners of Havelee, brought his suit in the Civil Court (the Moonsiff's) against Bidianund Singh to quash the Collector's decree as made without jurisdiction. The Moonsiff decreed in his favor. There was an appeal to the Principal Sudder Ameen who was against him. This was followed by a special appeal to the Sudder Dewanny Adawlut, which remitted the cause back to the Principal Sudder Ameen, with directions to try the proprietary right. This protracted and animated litigation, ostensibly for a sum of less than seven rupees, was obviously made a mode of trying the question of title between Bidianund Singh as the purchaser of the Nizamut Mehals, and first Ruhmut Ali Khan, and afterwards Wujhoonissa, (each of whom intervenes in the suit as an objecting party), as the owner of Havelee. The proceeding (pp. 381 and 382) shows that the real issue was whether certain subjects as to which all parties were agreed, including Ghauts Marug and Kurrailee, belonged to Havelee or to the Nizamut Mehals. The proceeding and report of the 9th December 1843, (pp. 328 and 329) showing that Ghauts Marug, Kurrailee, &c., were included in Mr. Beadon's settlement, were before the Court. The decision was that the Moonsiff's decree should be upheld, and that it was impossible to determine the proprietary right except in a regular suit, in which the two claimants should be plaintiff and defendant. Not the least important part of this proceeding is that Bidianund Singh, in his answer in the suit, alleged that the ghauts did not appertain to the rent-free Pergunnah Havelee, *that the Revenue Surveyor had excepted them from the measurement*. The objectors do not contest this last proposition, but insist that they are attached to Havelee, and do not belong to Purbut-parrah. Both sides, then, seem to admit that the subject of dispute was beyond the measured area and the confines of Ellis's map. There are similar decisions to

the above in other suits at pp. 155, 157, and 359. The last is as late as the 5th of July 1847.

Another instance of litigation involving the same issue is that in which Syed Reaz Ali, claiming as farmer of Tuppah Lodwah, was the suing party. By a proceeding of the 20th of November 1843, (p. 323) the Collector of Monghyr, before whom this person had brought a summary suit to recover rent alleged to be due from one Omachurn, then an occupier of part of the Boondee Mehal, the defendant having pleaded that the property in respect of which he was sued was part of Havelee, and had been settled with Ruhmut Ali Khan, called for the settlement proceeding, and, in its absence, for a report from the Collector of Bhaugulpore whether Mehal Boondee of Ghauts Kurrailee and Komaruk (obviously the same as Koh Marug) was comprised within the settlement rights of Ruhmut Ali Khan, or was appended to any other mehal.

At page 322 there is a report which was apparently made in answer to this requisition, though there is an inaccuracy in the printed date. It confirms the fact of the settlement as alleged by the defendant. On his coming in, the suit was finally disposed of by Mr. Vansittart, the Collector, (p. 326) who dismissed the suit as one which he was incompetent to try, with liberty to the plaintiff to sue in the Civil Court, if so advised. By this proceeding, it appears that Wahid Khan, the then farmer of Ghauts Marug, Kurrailee, &c., under Havelee, had intervened in the suit against his sub-tenant.

Again, the proceedings of the 11th of November 1843, at p. 324; those of the 9th of December in the same year, pp. 328 and 329; and the proceeding of the 16th of March 1844, at p. 327, all point to the conclusion that, during the investigation which led to the settlement of Mr. Piron, Meaz Reaz Ali claiming title under Bidianund Singh, if not Bidianund Singh himself, was unsuccessfully resisting the inclusion of the Bunkur of Ghauts Marug, Kurrailee, &c., in the Settlement of Havelee. The proceeding of the 11th of May 1844, p. 348, is also some evidence of this.

At p. 395, it appears, that Peer Khan Soobahdar delivered over possession of Ghauts Marug, Kurrailee, and the other ghauts comprised in his farm, to the purchaser of Havelee at the sale for arrears of revenue, in November 1845, or attorned as tenant to him.

These contentious proceedings certainly afford a strong inference that Ghauts Marug, Kurrailee, and others which were included in the settlement, were something beyond the limits of the measured area and Captain Ellis's map. It is impossible to read them without believing that the parties knew well what they were disputing about; and that each was claiming the same things. It is not probable that these things were within the measured area. Bidianund Singh could hardly push his pretensions so far as to claim anything within that area. On the contrary, as we have seen in Kishna Tewarry's case, his contention was that the things claimed were beyond the measured area, and therefore belonged to him, and the opposite party seems to have admitted the fact, and denied the consequence. Had one of the parties been claiming a ghaut in one part of a mountain range, and the other insisting on his right to retain a ghaut of the same name in another part of the range, it is inconceivable that there should be no trace of such a mistake in the pleadings of the parties, the reports of the Collectors, and the judgments of the Courts. In truth, the mention of the farm sometimes of Rujjub Ali, sometimes of Wahid Khan, in these proceedings, almost establishes the identity of the subject in dispute with the subject of the settlement.

The proceedings of the Officers employed in the topographical survey, also bear upon this point.

Of the reports of Talib Kurreem, p. 361, and Syed Mossein, p. 362, both in answer to the petitions from Bidianund Singh and the orders thereon, it is sufficient to say that, if they have no other value, they at least prove that when these

persons passed from admitted portions of Pergunnah Purbutparrah in the course of their survey into the disputed territory, they were met by claims on the part of Roodur Singh and his tenants ; and a *bond fide* contention, whether the land on which they stood, which they went to survey, and as to the locality whereof there could be no mistake, belonged to the Nizamut Mehals ; or, as appertaining to some of the ghauts in question, was part of Havelee.

Then came the proceedings of Mr. John Brown of the 29th of December, in which both the parties were in presence (p. 240). Mr. Brown's conclusion is no doubt against the view contended for by the respondent, that the ownership of the revenue of these ghauts imports the ownership of land in excess of the measured area ; but his proceedings sufficiently shows that what the parties were claiming was in the disputed territory ; one witness at least (Lushkurree Lall) p. 242, connects the property claimed with the former holding of Soobahdar Khan ; and though Mr. John Brown (p. 246), in his eighth reason, suggests that the Ghauts Marug and Kurrailee, that were settled, are within the measured area, he does not point out where they are situated. Nor was there any suggestion on the part of the opposite party that Roodur Singh had shifted the locality of the property so long in dispute between Havelee and the Nizamut Mehals. Mr. Brown's decision seems to have been over-ruled by Mr. Quintin, mainly on the ground that it proceeded on his construction of the settlement without regard to the evidence of possession (pp. 170 and 249).

Then followed the proceeding of Surfraez Ali, of the 29th of December 1847, (pp. 160 to 167), in which there may be some false reasoning as to some of the points before him, but which clearly establishes that the ghauts there claimed as comprised in the settlement of 1844 were the ghauts of those names in the disputed territory ; and were sworn to by Soobahdar Khan, who seems to have ceased to have any interest in the question, to be the ghauts that were comprised in his lease. It seems very difficult to question the finding of this Officer, making a local investigation, that the identity of the ghauts claimed with those settled was made out.

Again, Captain Sherwill was an European Officer of rank and of scientific reputation. He is at least entitled to credit for knowing his own business of topographer. He seems to have come by another road to the same conclusion as the Ameens, *viz.*, that a large hilly district belonging to Havelee, and comprising these ghauts, had been omitted from Ellis's map, (p. 389). He may be no authority touching questions of property, but he must at least be taken to have laid down accurately in his map the positions of the ghauts known in the district as Marug, Kurrailee, and by other names, about which the parties were disputing before the Ameen. His personal examination of the district is recorded in Mr. Quintin's final proceeding of the 24th of June 1848, at p. 171. On the other hand, it is to be observed that Captain Ellis's map does not profess to fix the sites of these ghauts. Their existence within its boundaries is mere matter of speculation suggested by the ingenious and able argument of the Attorney-General, who did not attempt to point out precisely where they were situate.

This evidence, however, seems to us to point, for the most part, rather to what was claimed as belonging to Havelee than to the nature and character of the Bunker and Boondee Mehals above-mentioned, and of the revenue arising from the ghauts, of which, in part at least, they consisted ; and certainly it does not satisfy us that Havelee, if entitled to any part, was entitled to the whole of the land in question in right of these Bunkur and Boondee Mehals and Ghauts. It is to be remembered that we have here to deal with a tract of land of enormous extent surrounded by Havelee and other Pergunnahs, and it is not easy to suppose that so large a tract of land should have escaped the attention of Captain Ellis if the whole of it belonged to Havelee at the time of its being resumed ; neither can we easily suppose that this large tract of land could have been intended to have been included in the Havelee settlement under the description of sayers and cesses,

when we find that other land of precisely the same quality and character was in that settlement described as land. We find, too, that the Officers of the survey have, as we have already pointed out, given to Havelee more than in our opinion belongs to it, and looking to the whole of the evidence in the case, we cannot see our way to conclude judicially that they have been right in giving to it the rest of the land in question.

We agree, indeed, with the majority of the Sudder Judges that the appellant has failed to prove that no part of the disputed territory was included in the settlement, and that he has failed to prove by independent evidence his right to recover the mouzahs specified in the plaint; but we cannot think that they were right in determining the case upon that mere failure on his part to support the burthen of proof cast upon him. Their judgment is not like one in ejectment under the old procedure: it is as final and conclusive between the parties as an adjudication on the merits would be. And its effect, as we have shown, as to give to Havelee something which on the evidence we think belong to the Nizamut Mehals.

In these circumstances the case, we think, is one which called for further enquiry; but in saying this we, by no means, mean to intimate that the appellant can be relieved from the burden of proof. On the contrary, we think that there has been so much of possession on the part of Havelee that the burden of proof must still rest upon the appellant.

For the reasons which we have given, we think that this decree cannot be supported in its integrity, and the order which we shall humbly recommend Her Majesty to make upon this appeal will be,—

To reverse the decree, but without prejudice to any question which may arise upon the enquiries to be made as after directed;

To declare the appellant entitled to the Mouzahs Gourmahee and Goruckpore, and the lands comprised therein and belonging thereto, and to all such other parts or any of the lands in question in the suit as are not included in the settlement of Havelee;

To declare that the settlement of Havelee comprises only the measured area of 1,23,207 beegahs, and so much of any of the land in dispute as upon the enquiries after directed may appear to belong or be properly attributable to the Bunker and Boondée Mehals in the pleadings mentioned, or to the ghauts, of which the same in part consists; and that the rights of Havelee in respect of Bakum do not extend beyond the 129 beegahs and 19 biswas mentioned in Beadon's Settlement, and which are included in the 1,23,207 beegahs;

To enquire what is the nature and character of the Bunker and Boondée Mehals, and of the Ghauts comprised therein respectively, which are included in Piron's settlement, and are therein estimated at Sicca Rupees 1,116; and whether the same, or any, and which of them included any, and what part of, or any and what right or interest in the land in question in this suit;

To declare that so much of the land in question in this suit as may upon such enquiry appear to be comprised in the said Bunker and Boondée Mehals or Ghauts belongs to Havelee, and that the appellant is entitled to recover the residue of the land in question; and to direct the Court to proceed in the suit as upon the result of such enquiry may appear to be just;

To direct any costs of the suit already paid to be refunded, and the Court to deal with such costs, and all other costs of the suit, including the costs of this appeal, as may seem just, having regard to the declaration aforesaid, and to the result of the said enquiry;

To declare that this order is to be without prejudice to any proceedings which may hereafter be taken for the settlement of Havelee.

The 20th July 1865.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir E. V. Williams, Sir L. Peel, and Sir J. W. Colville.

Principals—Factors—Consignees—Re-drafts—Interest.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Mirtunjoy Chuckerbutty,

versus

John Cochrane.

Factors having an interest, by reason of their advances, in their principal's goods, are justified in shipping those goods, for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their principal or by contract.

The evidence failing to shew that any particular usage or custom qualifying the Law of England as between principal and factor prevails in Calcutta—**HELD** that the powers and duties of the factors in making consignments of their principal's goods must be determined by the general Mercantile Law.

Factors entrusted with possession of their principal's goods, and having advanced upon them, shipped the goods to London, drawing bills against them in their own names, and selling the bills with the shipping documents in the market. The acceptance of the factors' bills by the consignees, and the delivery of the shipping documents to them, made them the pledgees but did not alter the character of the transaction, which was one whereby the factors had pledged the goods for the payment of bills on which they (and not the principal) were liable as drawers, for an amount exceeding the value of goods.

In such a case no privity exists between the consignees and the undisclosed principal. **HELD**, therefore, that, a loss having occurred on the shipments, the principal was liable to the factors' estate for the full amount of re-drafts representing that loss, although the factors had become insolvents, and had, in fact, paid only a small dividend on the re-drafts.

The Sudder Court—having reduced the rate of interest allowed by the Zillah Judge before the commencement of the suit from 12 per cent. to 10 per cent., the rate at which the account current between the parties bore interest, it was held that the same consideration should have determined the rate of interest to be allowed from the date of suit; and that the amount of this should also be calculated at 10 per cent per annum.

THE appellant in this case is the owner of silk filatures, and a dealer of silk in Jungypore, a district of Bengal. The respondent is the Official Assignee of an insolvent firm that formerly carried on business in Calcutta, under the style of Hickey, Bailey and Co.

That firm from the year 1840 up to the end of 1847 acted as the factors and agents of the appellant; selling some of the goods consigned to them by him in Calcutta, and shipping others to London for sale there; and the following seems to have been the course of dealing between them:—"The appellant was in the habit of drawing on Hickey, Bailey and Co., against the goods consigned to them, and they accepted and paid his drafts, charging him in account with the amount of them. If they sold the goods in Calcutta, they rendered the account sales to him, and credited him with the proceeds. Against the goods shipped to London they drew bills in sterling money upon the consignees; but credited the appellant in account with the proceeds of those bills in rupees at the rate of exchange at which they were sold in Calcutta; and on receiving the account sales from London, they either gave him further credit for the profit, or debited him with the loss on each shipment, according to the final result of the transaction. The account current so kept was balanced on the 30th of April in each year, and from time to time rendered to the appellant. From 1840 up to a period which, as found by the Courts below, we may take to have been some time in 1845, the consignments to London were shipped by Hickey, Bailey and Co., to the consignees "for sale on account and risk of Mirtunjoy Chuckerbutty." Examples of the invoices are given at p. 118 and elsewhere in the Appendix. About 1845 some change took place in the constitution of the firm of Hickey, Bailey and Co., and either contemporaneously with, or shortly after, that event, the shipments on account of the appellant were made in a different form; most of the invoices stating the goods to be shipped by Hickey, Bailey and Co., and consigned to the London House for sale on account of

the concerned ;" and one or two stating them to be consigned for sale on account of Hickey, Bailey and Co. Examples of the first of these two classes of invoice are at pp. 73, 77, 100, and elsewhere in the Appendix ; an example of the latter classes is at p. 74 of the Appendix. All these later invoices, however, continued to specify the mark or brand by which the appellant's silks were known in the market. It is upon the variation in the form of the consignments made in and subsequently to 1845, from that of the consignments made before that year, that the principal question on this appeal is raised.

The disputes between the appellant and Hickey, Bailey and Co. began in 1847, the year so disastrous to commerce in India. The letters of the 27th of November 1845, and the 21st of February 1846, (at page 59 of the Appendix), show that, from a date as early as the latter part of 1845, the silk market, both in Calcutta and in London, was in a state of great depression. On the 13th of April 1846, Messrs. Hickey, Bailey and Co. wrote to the appellant (Appendix p. 60):—" Our market continues worse every day. After having failed in attempting to sell your silk, we have, according to your request and instructions, shipped the whole on your account to London, the particulars of which will be forwarded to you in due course." And accordingly their letter of the 23rd December 1846, (Appendix p. 63), contains this passage:—" We also enclose invoices of 64 bales silk, and 900 pieces of your good corahs, shipped on your account to London ; the sums drawn against these shipments, as per memorandum at foot, viz., rupees 54,816-12-6 have been carried to your credit under due dates."

It is not difficult from this memorandum, and by means of the quantities of silk, and the dates and amounts of the bills there specified, to identify the shipments so advised with the shipments of 7 bales per *Oriental* and 8 bales per *Tartar* to Magniac, Jardine and Co., the shipment of 13 bales per *Kelso* to S. Phillips and Co., the shipment of 18 bales per *Essex*, to H. J. Johnston and Co., the shipment of 18 bales per *Cressy* to Cockerell and Co., and the shipment of 4 cases of corahs, also per *Cressy* to Thurburn and Co., which are respectively mentioned in the accounts. The losses on these shipments are amongst those his liability to which the appellant disputes ; and many, if not all, of them must have entered into the accounts which were the subject of the correspondence that will be next mentioned.

In August 1847, Messrs. Hickey, Bailey and Co. wrote to the appellant their letter of the 5th of that month, which is at page 60 of the Appendix. The most important passage in it is the first paragraph, which is in these words :—" We beg to wait upon you with the following : a statement of your account current exhibiting on the 30th of April last, a balance in your favour of Company's rupees 12,171-3-7, and a continuation of the same in open account to date showing a balance against you of about rupees 31,882-6-5. Four account sales from Messrs. Magniac, Jardine and Co., Samuel Phillips and Co., and Cockerell and Co., of London, comprising 69 bales of your silk, and three account sales comprising 51 bales of theirs." This letter also expresses an unwillingness in the then state of the markets to receive any further consignments "at drawn against ;" and presses the appellant to place the house in funds either by remittances or goods.

The appellant's answer to this communication was dated the 12th of August 1847, and is at page 102 of the Appendix. After professing himself confounded by the letter of the 5th, he says :—" The cost of the goods I consigned to you was 5,000 or 8,000 rupees more than I drew on you, and I believed you owed me that sum at least, but in your letter you make me your debtor more than 31,000 rupees. I am ashamed to hear this. Your old house several years has sent silk and corahs to England on my account, and the London houses have ever sent account sales, &c., for every transaction in my name, and I have these accounts in my hand. Your new house, I don't know how, has taken a new manner of business, and all the account sales sent to me now are copies signed in Calcutta ; this does not

satisfy me at all, and therefore I want the London account sales as formerly. There are many particulars I want to know in these sales, because I see in your copies several sales, on account of the concerned. Until I have the particulars, I will not examine the account current, I request you will send them to me as quick as possible."

In reply, Hickey, Bailey and Co., on the 28th August, sent the letter which is at p. 61 of the Appendix. In this they forwarded, though under a kind of protest, the original accounts demanded: complained of the tone of the appellant's letter to them; and again pressed for payment of the balance due to them.

There is no evidence of any further correspondence between the parties until October 1847. On the 11th of that month, Hickey, Bailey and Co., wrote a letter to the appellant, which is not in evidence. From the references to it in the subsequent correspondence, we may infer that it contained an account corresponding, more or less closely, with that mentioned in the record as No. 1.

In answer to it the appellant wrote the letter of the 25th October, which is at p. 103 of the Appendix, and in which he for the first time put forward distinctly the case on which he now relies. He says:—"I am very anxious to settle my two years' accounts with you. I hereby send you the copy of the abstract of your letter, dated 11th October 1847, (this is the letter, of that date set out at p. 98 of the Appendix), for your inspection. In your opinion my goods created a good name in the London markets; so relying on your statement I desired you to ship a quantity of my silk, but you in contravention to your practice shipped them in your own name instead of mine, and, therefore, owing to my name being suppressed, I hold you responsible for the loss. It is very easy to settle accounts. I will only debit you with the invoice cost of the goods shipped by you to London; likewise, I will debit you with amount of the account sales sent by you with the interest. You may also, according to former practice, debit in my name the amount I received from you with interest, and also costs."

The reply of Hickey, Bailey and Co. to this is dated the 30th of October, and is at p. 62. After explaining the letter of the 11th of October 1847, they say,—“Regarding the shipments, we must beg to observe that the invoices of your property have been uniformly worded according to the practice followed in Calcutta, ‘on account of the concerned,’ under your well-known filature mark, and not in our name as you pretend, which, however, would make no difference in the result of the operations. You were fully made aware of those shipments by our letter of the 23rd of December 1846, &c., and, therefore, cannot, at this late hour, because the result has been a loss, pretend to have no personal interest, and decline all responsibility in shipments made on your account, and to which you have till now made no objections, you having, on the contrary, in many of your letters, directed us to ship your goods on your own account, and not to sell them in Calcutta, evidently because you expected a more profitable realization of them by so doing. We, therefore, beg to hand you again a statement of your account, closed 30th April last, showing a balance in our favor of Company’s rupees 22,312-9-6, and a continuation of the same in open account, showing a balance against you up to date of Company’s rupees 48,547-1-0. *This account, you will see, has been corrected, owing to a mistake in crediting you with a draft for 10,000 rupees against a shipment which had nothing to do with your account.*” The right to make this correction is also a material question on this appeal.

The appellant replied to this letter by that of the 18th of November, which is at p. 104 of the Appendix. The following are the material passages in it:—"I am informed of the particulars from the contents of your letter, dated the 30th of October, which reached me at a time when I was busily engaged in preparing your accounts, and, consequently, could not reply to it. I am now sending you the account for your inspection, bearing a balance of rupees 1,390-12-1 in my favor,

which please let me have. The points treated by you in your letter may be true in your opinion, but in my opinion they are improper: for my goods were unjustly shipped to England. Notwithstanding this I have forwarded bills to you, and debited you with the cost price of them. I have credited you with the amount you paid to me, and entries have been made regarding your commission and discount according to the former practice."

Messrs. Hickey, Bailey and Co. stopped payment early in January, and were formally adjudged insolvents on the 17th of February 1848. In their Schedule the claim against the appellant was entered as "disputed." The respondent afterwards became the official assignee of this insolvent estate, and some correspondence appears to have passed between him and the appellant touching the disputed claim on the latter, in June and July 1849. The appellant's letters are at pp. 103 and 104 of the Appendix. He continued to insist on his view of his rights, and, instead of admitting anything to be due from him to the estate of Hickey, Bailey and Co., to contend that the sum of rupees 1,390-12-1, was due to him on the balance of the account as made out by him.

In July 1857, after a delay not very satisfactorily accounted for, on the ground of the poverty of the estate and the complexity of the accounts, the respondent, under the authority of the Insolvent Court, commenced an action in the Zillah Court of Moorsheadabad against the appellant, for the recovery of 1,00,000 rupees, the balance alleged to be due on this disputed account. The plaint showed that the balance claimed to be due at the date of the insolvency, with the subsequent interest, amounted to 1,10,938 rupees and a fraction; but relinquished all in excess of the 1,00,000 rupees in pursuance of a rule which obtained in the Courts of the East India Company, and forbade a plaintiff to recover more than double the amount of his principal debt.

The judgment of the Zillah Court, which is dated the 2nd of February 1859, and is at p. 19 of the Appendix, decreed the whole amount claimed to the respondent, with interest at the rate of 12 per centum per annum, from date of suit to date of payment.

On appeal, the Sudder Court confirmed this judgment on all points except the calculation of interest. It held that the sum claimed as principal money, and the balance due to the insolvent firm in February 1848, being rupees 54,784-9, should be corrected by the deduction of the difference between 12 and 10 per cent interest on the account between the 30th of April 1846, and the 30th of April 1847; it refused to allow the respondent any interest on the sum so ascertained during the period in which he had delayed to bring his suit, but gave him interest on it from the date of the commencement of the suit to the date of payment, at the rate of 12 per centum per annum. This judgment is at p. 133 of the Appendix, and bears date the 24th of February 1862.

From these decrees the present appeal is brought; and the substantial questions to be determined upon it (some minor points that were raised on the pleadings having been given up in the Courts below or here) seem to be reduced to the following, *viz.* :—

1. Whether the appellant is properly chargeable with the balance of the account between him and the late firm of Hickey, Bailey and Co., taken on the principle on which this account has been taken, or whether he is now entitled to have that account taken on the principle asserted in his letters of the 25th of October and 18th of November 1847, *viz.*, that of treating all the later shipments to England as made by Hickey, Bailey and Co., at their own risk, and of debiting them with the prime cost, or other assumed value of the goods in Calcutta at the dates of the shipments?

2. Whether, assuming the shipments to have been made at the risk of the appellant, it is proper under the circumstances to charge him with the amounts of the re-drafts from London?

3. Whether he is entitled to any and what relief in respect of the item of 10,000 rupees withdrawn by Hickey, Bailey and Co., from the amount as mentioned in their letter of the 30th October 1847?

4. Whether the interest on the balance due by him has been correctly calculated?

The first question involves the enquiry whether Hickey, Bailey and Co., when they made the consignments of the appellant's goods in the form in which they are shown to have made them subsequently to the year 1845, were guilty of any breach of the duty which either the general law, particular custom, or special contract between them and their principal, imposed upon them as factors. In the Court below evidence was given to show what are the general powers of factors in Calcutta who are employed to ship goods for sale in England on account of their principal. Their Lordships apprehend that this evidence was adduced not so much for the purpose of establishing that any peculiar custom of trade obtained in the port of Calcutta, as for that of showing what was the general law, the country Courts of India not being very conversant with questions of Mercantile Law, and not recognizing the Law of England as the *lex fori*. But, however that may be, their Lordships are of opinion that the evidence altogether fails to show that any particular usage or custom qualifying the Mercantile Law of England, as between principal and factor, prevails at Calcutta. It is, therefore, by the general Mercantile Law that the powers and duties of Hickey, Bailey and Co., in making their consignments of the appellant's goods, must be determined.

Again, their Lordships see no ground for dissenting from the exposition of the law which is contained in the careful judgment of the Sudder Court at p. 136 of the record. They are of opinion that Hickey, Bailey and Co., as factors, having an interest by reason of their advances in the appellant's goods, were justified in shipping those goods for sale either "on account of those concerned," or "on account of themselves," unless their general authority was controlled by instructions from their principal, or by contract. Of positive instructions or of express contract there is no proof. The existence of either, if to be inferred at all, is only to be inferred from the evidence of the course of dealing before 1845.

Again, their Lordships are of opinion that, even if there were nothing to set against the course of dealing so proved, the inference from it that the general discretion of the factors in respect of all future consignments had been controlled, would hardly be safe or legitimate. But, in truth, the prior course of dealing is not the only fact from which their Lordships have to draw their conclusion on the point now under consideration. The letter of the 23rd December 1846 proves that invoices of the consignments of that year were then sent to the appellant. All those invoices are not produced; but it is impossible to escape the conclusion that they must have shown in what form the consignments were made; since the losses on the shipments to which they relate are unquestionably some of those which the appellant, on the ground of the improper form of the consignment, is now seeking to throw on the estate of Hickey, Bailey and Co., and he does not pretend that the invoices sent to him were not counterparts of the invoices sent to England. Nevertheless, on the receipt of that letter he made no complaint respecting the form of the consignments.

Again, when these transactions were known to have resulted in heavy losses, and he wrote this letter of the 12th of August 1847, his chief complaint was that, in the absence of the original account sales, he had not the proper evidence of what had been done with his goods in England; and, it was not until October 1847 that his present case was distinctly made. The correspondence thus tends strongly to negative the existence of instructions, contract or understanding inconsistent with the acts of Hickey, Bailey and Co. Their Lordships, therefore, think that the alleged breach of duty on the part of the factors has not been established, and that, as between them and the appellant, he was chargeable with the losses on all the shipments to England. The foundation of his case having thus failed, it is

unnecessary to enquire whether, if it had been established, he would have been entitled to the particular relief which he claims. Their Lordships, however, observe that in many important particulars this case, if the agent's breach of instructions had been proved, would have been distinguishable from that of *Bertram vs. Godfrey* in "*Knapp's Reports*." There it was proved that the agents who, in breach of their instructions, had neglected to sell at 85, might have sold at that price; and, consequently, the facts both gave the measure of the damages sustained, and afforded the means of compelling the agents to put their principal in the position in which he would have stood had they observed his instructions. Here it is quite uncertain what (if any) proportion of the loss is attributable to the form of the consignment. Nor is it easy to see upon what principle Hickey, Bailey and Co. could be charged with the cost or invoice price of the goods; since it follows from the letter of the 13th of April 1846, both that the appellant had authorized the shipment of them for sale in England; and that they must have been sold at a heavy loss, if sold at that time, in Calcutta.

The next question is, whether the appellant has been properly charged in account with the re-drafts. It is stated in the judgment of the Sudder Court (p. 137) that no question had been raised regarding the good faith of these entries. They must, therefore, be taken to represent correctly the difference between the net proceeds of the appellant's goods, and the amounts of the bills drawn against them by Hickey, Bailey and Co. Had Hickey, Bailey and Co. remained solvent and paid the re-drafts, the propriety of these charges against the appellant could not have been questioned. For he had already received credit in account for the sums for which Hickey, Bailey and Co.'s bills on London had been sold; and, therefore, to charge him with the re-drafts was only tantamount to writing back the excess of credit, which he had received in anticipation of the realization of the proceeds of his goods. The question raised, however, is whether Hickey, Bailey and Co. having failed; and having presumably paid, at most, a dividend on these re-drafts, they are entitled to charge the whole amount of them against the appellant. The answer to this question depends on the further question, whether, upon or after the insolvency of Hickey, Bailey and Co., the consignees in England had any right of resort to the appellant for the recovery of the difference between the sums realised by the sale of the goods, and the amount of their acceptances against them; or the unpaid portion of such deficiency. If they had no such remedy, the appellant, as the account stands, has received credit for all to which he is entitled, *viz.*, the net proceeds of his goods; whereas, if he were to retain credit for the amounts for which the bills on London were sold without submitting to be debited with the re-drafts, he would charge the estate of Hickey, Bailey and Co., with more than the net proceeds of the goods. On the other hand, if he remained liable to the consignees for the losses on the goods or for any part of such losses, his objection to a mode of stating the amount, which would have the effect of making him pay, or leaving him answerable for such losses, twice over, would be well-founded.

It appears to their Lordships that in these transactions there was not that privity of contract between the appellant and the consignees in England, which would render him liable for the sums represented by the re-drafts in question.

This is not the ordinary case of a contract made by an agent for an undisclosed principal, on which the contractee, on discovering the principal, may, at his election, sue either principal or agent.

The contract on which the liability, in respect of which the re-drafts were drawn, arose, was not a simple consignment of goods for sale by an agent on account of an undisclosed principal; it was a contract of pledge by factors having an interest in the goods pledged. Hickey, Bailey and Co., being entrusted with the possession of the goods, and having advanced upon them, drew the bills on London in their own name, they and not the principal were liable as drawers on those bills; and they probably sold the bills with the shipping documents in the market. Had the

bills not been accepted by the consignees, the holders though pledgees, by means of the bills of lading, of the goods, could have had no remedy for any deficiency against the appellant. The acceptance of the bills by the consignees, and the delivery of the shipping documents to them, made *them* the pledgees, but did not alter the character of the transaction, which was one whereby Hickey, Bailey and Co. had pledged the goods for the payment of bills on which they, and not the appellant, were liable as drawers for an amount exceeding the value of the goods. The re-drafts are for that excess. There seems on such a transaction to be no privity of contract between the consignees and the undisclosed principal. How can such a privity be imported into it by the fact that, according to the course of dealing between Hickey, Bailey and Co. and the appellant, the latter received credit on account for the sums for which the bills on London were sold, subject to the final adjustment of the accounts of the different consignments?

Their Lordships are therefore of opinion that the appellant has been properly charged with the re-drafts.

We have next to consider the disputed item of 10,000 rupees. In the account No. I (at p. 22 of the Appendix) the appellant is credited with this sum under date the 13th of April 1846, as the proceeds of a draft of Hickey, Bailey and Co., on Gouger and Stewart, of London, against sixteen bales of raw silk, shipped for appellant's account per *Orient*; and under date March 18th, he is on the other side of the same account charged with rupees 541-12-6, as commission and shipping charges on the same consignment. It has already been stated that, by their letter of the 30th of October 1847, Hickey, Bailey and Co. advised the appellant that this shipment had been erroneously treated as made on his account; that he had, in fact, nothing to do with it; and that they had, accordingly, corrected the account by striking out the credit of 10,000 rupees.

It seems that, in the first instance, they omitted to strike out as they ought, on this view of the case, to have done, the charge of rupees 541-12-6; but this omission was afterwards set right by the respondent (Appendix p. 3). In the plaint and subsequent proceedings this shipment and the credit attached to it are stated generally and loosely to have been those "of another merchant;" and the only case thus made by the appellant on this point, was to the effect that no sufficient reasons had been assigned for withdrawing from the account a sum with which he had been once credited; and that the respondent's looseness of statement concerning the transactions was an argument for holding that the deduction of the sum in question had been made fraudulently. On the trial in the Zillah Court, Mr. Morinet, the former book-keeper of Hickey, Bailey and Co., was examined as to this item. This evidence (*see* Appendix, p. 67) was to this effect, "This silk did belong to the defendant originally, but was shipped by Hickey, Bailey and Co. on their own account, they having purchased it, and rendered the account sales to the defendant." No question was put to him by way of cross-examination on this statement, although he was cross-examined by the appellant's agents as to another part of his evidence. The contest in both the Courts below apparently continued to be confined, as before, to the propriety and *bond fides* of the alteration in the accounts. Their Lordships see no grounds for disturbing the conclusion of both the Courts below upon this point. They accept Mr. Morinet's statements as the true account of the transaction. He was not cross-examined upon it; there seems to have been no suggestion in the Courts below that the appellant had not received credit for the proceeds of these bales of silk as sold in Calcutta. There is an item in the accounts which are in the record which seems to represent those proceeds; and the fact would probably appear even more clearly if we had the Bengalee account made out by the appellant on the principle asserted by him which was before the Courts below. It is difficult to conceive that he would allow the account to be finally taken against him without seeing that in one way or other every bale of silk which was consigned by him to Hickey, Bailey and Co. was accounted for.

The evidence of Mr. Morinet, however, suggests another question, which, although it has not been dealt with in the Courts below, their Lordships have been unwilling to exclude from their consideration. That question is, whether the transaction, as described by Mr. Morinet, is not one which the appellant may impeach as a fraudulent purchase by an agent on his own account of his principal's goods. In an ordinary case it might fairly be objected that this point was not taken upon the pleadings. The answer to that in the present case is, of course, that the respondent, by speaking of the transaction as one of another merchant, has misled the defendant, and thrown considerable suspicion on the *bond fides* of his own case. On the other hand, it is to be observed that Mr. Morinet, if cross-examined, might have cleared up the transaction, and have shown that the purchase by Hickey, Bailey and Co. was known to and sanctioned by the appellant. Again, it was open to the appellant, if he were interested in so doing, to raise the point now under consideration in the Indian Courts, where he was represented by an eminent English barrister, to whom the equity on which it is based must be familiar. That he failed to insist on this equity, is a strong argument that it was not for his interest to do so. He could only have set aside this purchase by Hickey, Bailey and Co. on the terms of writing back the sum for which he had received credit as the proceeds of the sale to them, and by taking to the shipment to England, with its loss or profit as the case might be. And there seem to be no reason why this particular shipment of sixteen bales should have escaped the common fate which, on the evidence, we must take to have befallen the other consignments of silk which were shipped from Calcutta about that time, and have realized a profit, instead of resulting in heavy loss. It may be added that the point is not distinctly taken in the appellant's case. On the whole, their Lordships see no sufficient ground for re-opening this account in respect of the item of 10,000 rupees.

The only remaining question is that of the interest to be allowed. The Sudder Court, in the exercise of the discretion given to it by Act XXXII of 1839, has given interest, from the date of the commencement of the suit, at the rate of 12 per centum per annum. There was evidence that the account current between the Hickey, Bailey and Co. and the appellant bore interest at the rate of 10 per centum per annum only; and on that ground the Sudder Court reduced the interest allowed by the Zillah Judge before the commencement of the suit. Their Lordships are of opinion that the same consideration should have determined the rate of interest to be allowed from the date of suit. And that the amount of this should also be calculated at 10 per centum per annum.

The order, therefore, which their Lordships propose humbly to recommend to Her Majesty as proper to be made on this appeal is, that the interest allowed from the date of suit to the date of payment be reduced by the difference between 12 per centum and 10 per centum per annum, and that in other respects the decree of the Sudder Court be affirmed. But having regard to this alteration in the amount decreed, and to the other circumstances of the case, they will also recommend that each party do bear his own costs of this appeal.

The 26th July 1865.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel,
and Sir J. W. Colvile.

Registration Act (XIX of 1843)—Construction of.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Sreenath Bhuttacharjee,

versus

Ram Comul Gangooly, Gobind Chunder Mozoomdar, Gobind Chunder Sen, Taraprosono Mookerjee, and Chunder Coomar Roy, by substitution
for Juggut Chunder Mookerjee.

The words "any knowledge of notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding" in Section 2 Act XIX of 1843, refer not only to the mortgages and certificates mentioned in that part of the Section which immediately precedes these words, but extend also to the deeds of sale or gift which are mentioned in the earlier part of the Section.

The words "provided its authenticity be established to the satisfaction of the Court" in the same Section, point not merely at the exclusion of a forged deed from the benefit of the Act, but also of a deed tainted by fraud although in other respects genuine.

IN disposing of this appeal their Lordships do not think it necessary to enter fully into the details of the case. The view they take of it will be sufficiently explained by a mere general outline of the facts. Ramcomul Gangooly was originally mortgagee of the entirety of the zemindary, pergunnah Havaleshur. He subsequently acquired the full proprietary right to and possession of the zemindary by a foreclosure suit, and suit for possession consequent thereon, and after he had thus acquired the proprietary right in the zemindary he applied for the mutation of names in the Collectorate, and was there registered as sole proprietor of the whole zemindary. The appellant, Sreenath Bhuttacharjee, alleges that Ramcomul Gangooly, before he had acquired the proprietary right in the zemindary by an ikrar or agreement for sale, dated the 20th December 1852, agreed with Taraprosono Mookerjee that, in the event of his acquiring the proprietary right, he would transfer a moiety of the zemindary to Taraprosono; and that, after he had acquired the proprietary right, he, by a kubala or deed of sale, dated the 31st July 1853, transferred the moiety of the zemindary to Taraprosono accordingly. The moiety of the zemindary thus transferred to Taraprosono was, as the appellant alleges, afterwards conveyed to him by deed, bearing date the 27th March 1854: but this deed was not registered until the 2nd May 1854. In the meantime, and on 5th April 1854, Ramcomul Gangooly, by a deed of that date, in consideration of the sum of 90,000 rupees conveyed the whole zemindary to Gobind Chunder Mozoomdar, and by a deed of even date Taraprosono Mookerjee, in consideration of the sum of 15,000 rupees, also conveyed all his interest in the zemindary to Gobind Chunder Mozoomdar, and on the 20th April 1854, both these deeds were duly registered.

After the execution of these deeds, Gobind Chunder Mozoomdar had possession of the whole zemindary, and he was in possession of it when the suit, out of which this appeal has arisen, was instituted.

This suit, which is in the nature of an ejectment suit, was instituted by the appellant against Ramcomul Gangooly, Gobind Chunder Mozoomdar, and Taraprosono Mookerjee, and several other persons, for recovering the moiety of the zemindary alleged to have been conveyed to the appellant in manner above mentioned. The plaintiff in the suit alleges that Ramcomul, through fraudulent motives, had disposed of the whole zemindary (including the moiety previously sold by him to Taraprosono Mookerjee) to Gobind Chunder Sen in the fictitious name of Gobind Chunder Mozoomdar, under a kubala, dated the 4th April 1854, for consideration

of 9,000 rupees, but the plaint contains no allegation whatever of any fraud on the part of Gobind Chunder Mozoomdar.

Gobind Chunder Mozoomdar, by his answer, wholly denies the title set up by the appellant, and rests his case on the conveyance to him by Ramcomul. He sets up no title under Taraprosono Mookerjee, and on the contrary, he says that Taraprosono Mookerjee had no right or interest in the zemindary; but it appears, both by the answer and throughout the proceedings in the suit, that Taraprosono Mookerjee had under his alleged ikrar and kubala set up claims to the property, and the answer in effect treats the release from him as obtained for the purpose of putting an end to those claims. There is a great deal of evidence in the cause with reference for the most part of the alleged ikrar and kubala set up by the appellant; but on the hearing of the cause before the Principal Sudder Ameen, he dismissed the suit, and upon appeal this decree was affirmed by the Sudder Court. The appeal before us is from these decrees.

The judgments, both of the Principal Sudder Ameen and of the Sudder Court, appear to have proceeded upon a full and careful examination of the facts of the case; but their Lordships, as they have intimated, do not find it necessary to enter upon this examination.

It appears that, by the Indian Act XIX of 1843, which is set out in the Schedule to the appellant's case, it provided "that from the first day of May last every deed of sale, or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed, prior or subsequent to the registered deed; and that from the said day every deed of mortgage on land, houses, and other real property, as well as certificates of the discharge of such encumbrances, a memorial of which has been, or shall be, duly registered according to law; and, provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgages shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificates alleged to be had by any party to such registered deed or certificate notwithstanding."

Their Lordships are of opinion that this case may well be decided, and ought to be decided, upon the provisions of this Act.

Two questions arise upon the Act; *first*, whether the words at the close of the enactment, "any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding," are to be construed as referring only to the mortgages and certificates mentioned in that part of the enactment which immediately precede these words, or are to be taken to extend also to the deeds of sale or gift which are mentioned in the earlier part of the enactment; and, *secondly*, what meaning is to be attributed to the words "provided its authenticity be established to the satisfaction of the Court," which are contained in the enactment. As to the first question, their Lordships are of opinion that, upon the true construction of the Act, the words first above mentioned apply not only to deeds and certificates of mortgage, but also to deeds of sale or gift. This enactment, although divided into two branches in consequence of the different effect which is given to it as to deeds of sale and of mortgage, was plainly intended to be a general enactment. The words we are considering are words of reference, and the terms used being general and comprehensive, their Lordships see no reason for confining their operation to one branch of the enactment rather than extending it to both. Had it been intended that they should be so confined, there would have been no difficulty in expressing that intention. It would be difficult to find any reason why, in the case of a mortgage, priority should be given to a registered deed over an

unregistered deed, notwithstanding knowledge or notice of the unregistered deed by the registered mortgagee ; but in the case of a sale the priority of an unregistered deed over a registered deed should be retained, in cases of knowledge or notice, by the registered vendee or donee. The too common practice in India of setting up forged and fraudulent deeds, and the security against this practice which is afforded by registration, are quite sufficient to account for this enactment extending both to sales and mortgages, and the policy of such enactments is not unknown in other countries. The Irish Registration Acts afford an instance of it. Then as to the second question. The proviso is that the authenticity of the deed be established to the satisfaction of the Court. The word "authenticity" would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act ; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest and *bonâ fide* deed. They are not disposed so to construe the Act, but they think that at all events a registered deed cannot be deprived of the priority given by the Act, unless it be both alleged and proved that there was fraud on the part of the grantee, and in this case no fraud is alleged, and certainly none is proved, on the part of Gobind Chunder Mozoomdar. It would be going much too far to impute fraud to a purchaser upon the mere ground that he had bought up a possible claim, and so far as their Lordships can find, there is nothing beyond this affecting Mozoomdar either in point of allegation or of proof. Of course, it has not escaped their Lordships' attention that there is an allegation in the plaint which suggests collusion between Mozoomdar and Taraprosone, but their Lordships see no proof of this. Upon the whole, therefore, they are of opinion that Mozoomdar's deed being first registered, must prevail over the subsequently registered deed of the appellant, and they must, therefore, without entering further into the case, humbly recommend Her Majesty to dismiss this appeal, and with costs.

The 1st December 1865.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir. J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Limitation (Clause 3 Section 3 Regulation II. 1805)—Suit for Rent—Possession rent-free for 60 years before suit.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Chundrabullee Debia,

versus

Luckhee Debia Chowdrain.

A suit for rent is barred under Clause 3 Section 3 Regulation II. 1805, against a person who has been, by himself or by those under whom he claims, in peaceable possession without payment of rent for 60 years before the commencement of the suit.

That Clause takes away from the Courts all authority to take cognizance of any suit whatever if the cause of action shall have arisen 60 years before the institution of the suit ; it precludes all enquiry into any original defect in the title under which the possession commenced, and makes it unavailing to show that the possession commenced under a grant made null and void by Regulation XIX. of 1793.

THIS was an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, affirming a decree of the Principal Sudder Ameen of the Civil Court of Mymensing, which last had reversed a decree of the Sudder Ameen of the last named Court in favor of the appellant. The respondent has not appeared, and this appeal has been heard *ex parte*.

The original suit was brought by the respondent to recover arrears of rent for six years and nine months preceding its commencement, and the following may be

taken to be the facts of the case :—The appellant and those under whom she claims had been in peaceable and undisturbed possession of the property for more than sixty years ; it is in the town Nüsseerabad, and within and parcel of a 4 annas share of the zemindary of Pergunnah Allapsing, of which the respondent, as mother and guardian of her son, a minor, is the proprietor in possession. The appellant claims under a grant from the ancestor of the respondent, which purports to have been made for the setting up an idol ; and concludes thus—“ Having set up the said idol in the said house, you will enjoy the same without paying rent through sons and grandsons. For this purpose I have given you this *bromultur pottro*.” The date of his instrument corresponds with 10th February 1796 A. D. The idol has remained, and its worship has been continued uninterruptedly from that time. The respondent's plaint, which was not filed until the 15th April 1857, was preceded by no demand of rent nor any suit for the assessment of it ; but the rent sued for is stated to be “ in accordance with the rate of rent obtaining in lodging-houses at this place of Nüsseerabad :” this rate being fixed by the Bengal Regulation XIX. of 1793, Section 10 ; on which, indeed, the respondent's case entirely depends.

These are all the facts, and it seems clear that, if the original grant has not been annulled by any Regulation, or if the possession has become unimpeachable by reason of the lapse of time, either of the twelve years or of the sixty years prescribed by the Bengal Regulations, or if at all events it was under the circumstances necessary that this action should have been preceded by a suit for assessment of the rent, or a demand of rent ascertained in some way or other, the original suit could not be maintained, and the two latter decrees must be reversed. They were impeached for the appellant on all these grounds. Their Lordships, however, do not find it necessary in this case to give any opinion upon the first or third of these points, or upon the question whether under the circumstances of this case the twelve years' limitation prescribed by the Regulations, ought to be held applicable to it. They have reason to believe that questions of some importance, and possibly of some difficulty, have been raised, and that some cases which were not cited at the Bar have been decided in the Courts in India, bearing more or less directly on some at least of these points, and think it would neither be prudent nor safe for them, more especially in a case which has been argued on one side only, to give any opinion which might affect these questions. Moreover, it is obvious that to decide this case upon the last of the grounds on which the appellant relied, might only lead to renewed litigation. Their Lordships, therefore, abstain from giving any opinion whatever upon any of these points.

It may be assumed for the purpose of argument, but for that purpose only, and without the expression of any opinion by their Lordships, that all these points ought to be decided in favor of the respondent ; but they are of opinion that the appellant was entitled to have the suit dismissed upon the ground of their having been in peaceable possession by her and by those under whom she claims for sixty years before the suit was commenced, and of the suit being therefore barred by the early part of the 3rd Article of the Bengal Regulation II. of 1805.

The first and second Articles, and the second branch of the third Article of this Regulation, have reference to the twelve years' limitation which was previously in force, explaining and qualifying that limitation ; and as their Lordships do not, as has been already said, rest their judgment on this limitation, it is unnecessary to comment on these parts of the Regulation ; but the first branch of this third Article provides that “ nothing in the preceding Clause, or in any part of the existing Regulations, shall be held to authorize the cognizance of any suit whatever in any Court of Justice, if the cause of action shall have arisen sixty years before the institution of the suit ; nor shall any plea on the part of the plaintiff for the non-prosecution of his claim of right during a period of sixty years after the origin of his alleged cause of action, nor any original defect of title on the part of the possessor of the property claimed, after the lapse of such period, be deemed a sufficient

ground for taking judicial cognizance of any suit so preferred." This branch of the Article, therefore, in its very comprehensive language, embraces every then existing Regulation by which any Court in Bengal was authorized to take cognizance of any suit whatever ; it, in effect, takes away that authorization if the cause of action shall have arisen sixty years before the institution of the suit ; it distinguishes between the effect of the twelve years' limitation and that of sixty, by precluding all enquiry into any original defect in the title under which the possession for the latter period commenced ; it makes it, in effect, in cases in which the Section applies, unavailing to show that the possession of the appellant commenced under a grant made null and void by the Regulation of 1793.

The question then is, what is the cause of action in the present case, and when did it arise ? In terms the suit is brought to recover rent for the last six or seven years, and the non-payment of that rent is, no doubt, in one sense, the cause of action.

The suit, indeed, may in some sense be likened to what is of daily occurrence, the action to recover the later items only of a long account, which have become due within six years, although the Statute of Limitations has barred the demand for the earlier items. The distinction, however, between such an action and the present suit is obvious ; the items of an account are independent of each other : each represents a distinct contract or a distinct debt. But the right to recover rent, for the last six or seven years, depends on a possession founded on a grant avoided by the Regulation, which possession has been one and entire in character through the whole sixty years.

It is the case of the plaintiff in the Court below that, by reason of the character of the grant and the operation of the Regulation, his ancestor might have determined the possession in the first year of its existence, or claimed rent at the end of that year. If, in spite of length of possession, an action for use and occupation could be maintained, so long as a plaintiff could show a good title in himself and a bad one in the occupier, of what avail would any Statute of Limitation be ? A man might be barred in an action directly brought to recover the possession, such as ejectment, and yet not be barred when he sued from year to year, in use and occupation, for a compensation for the fruits of the land ; because in this the occupation would be referable to the sufferance and permission of the real owner, and so be a good consideration for an implied promise to pay what it was worth. But this clearly could not be ; and so here, if no action could be maintained directly to recover the possession of the land, none can be brought to recover the rent, which is the compensation for the occupation—that occupation having been always of one and the same character ; in fact, rent-free.

Their Lordships being of this opinion will therefore humbly advise Her Majesty that this suit was barred by the sixty years' possession of the appellant, and those under whom she claims, and therefore that the original judgment of the Sudder Ameen dismissing it ought to be affirmed, and the two later judgments reversed, and the costs of all the proceedings below with those of this appeal, be paid by the respondent.

The 1st December 1865.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colville, Sir E. V. Williams, and Sir L. Peel.

Compensation in lieu of Pilgrim Tax at Gya.—Government system of accounts not to prejudice private rights of parties.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Maharanee Inderjeet Kooar,

versus

Ismudh Kooar and Soonnut Kooar.

The late Maharajah Mitterjeet Singh was entitled to the levy of a tax upon Pilgrims resorting to the Temple at Gya. On the abolition of the tax by the Government, a compensation was awarded to the Maharajah in lieu of it in the shape of a perpetual annual payment, which sum, it was settled by an agreement and a decree of the Sudder Court during the Maharajah's life-time, was on his death to be divided in certain proportions between his two sons through whom the present appellant and respondents claim as their heirs respectively. **Held** that, in whatever mode the Government might think proper to deal with this sum with reference to the jumma, the rights of the parties could not be affected thereby without their consent, but would continue to be adjusted according to the proportions originally established.

THIS is an appeal from four decrees of the Sudder Court of Calcutta, reversing four decrees of the Principal Sudder Ameen of Zillah Behar in favor of Maharajah Heetnarain Singh, whose widow and heiress is the appellant. The respondents are the widows and heiresses of the late Modenarain Singh, who was the brother of Heetnarain Singh, and the plaintiff in one and defendant in three of the suits in which the decrees now under appeal were made.

The four suits involved the same question, which is shortly and accurately stated in the appellant's case, as follows :—

“ Whether Heetnarain Singh and Modenarain Singh were entitled to the annual sum of 17,212 rupees 9 annas 5 pies, in the proportions of $\frac{3}{4}$ ths and $\frac{1}{4}$ ths respectively, in accordance with the contention of Heetnarain Singh; or in the proportions of the amounts of *sudder jumma* payable by them respectively on account of the nineteen mehals in the pleadings mentioned in accordance with the contention of Modenarain Singh.” The two brothers were sons of the Maharajah Mitterjeet Singh, who died on the 3rd October 1840. During the life-time of the Maharajah, an agreement was entered into for a division of the property between his two sons after his death. The particulars of this agreement are stated in a former suit between the brothers, which was brought by appeal before their Lordships, and is reported in 7 Moore, p. 312, to this effect : “ Family dissensions having arisen during the life-time of Mitterjeet Singh, certain proceedings were instituted, and on an appeal to the Sudder Dewanny Adawlut, in a suit in which Mitterjeet Singh and the appellant and respondent were parties, a compromise was entered into, and a *vazeenamah* and *ekranamah*, dated the 7th February 1824, was filed by Mitterjeet Singh, which instrument was to the effect that the real and personal estates held by him after his death were to be divided between the appellant and the respondent; the former was to take a 9 annas share, and the latter a 7 annas share. Partition deeds of the same tenor were also filed, and on the 4th March 1824, the Sudder Court decreed that the parties should act up to the terms entered into by them in the above mentioned instruments.”

The Maharajah Mitterjeet was entitled to a tax levied upon pilgrims resorting to the Temple at Gya. This tax was abolished by the Government in the month of January 1840, and a compensation was awarded to the Maharajah in lieu of it in the shape of a perpetual annual payment of 17,212 rupees 9 annas 5 pies. The grant of this compensation was the subject of a Government letter of the 16th January 1840, which, unfortunately, is not printed in the proceedings.

On the death of the Maharajah, his property, whether moveable or immovable, had to be divided between the sons according to the proportions of $\frac{3}{4}$ ths and

$\frac{7}{16}$ ths settled by the agreement and decree of 1824. And the compensation tax, as part of that property, was divisible in these proportions. His immoveable property, which was very extensive, consisted partly of nineteen mehals which were held by him in severalty, and partly of mehals which he held conjointly with other persons. Disputes arose between his sons immediately after his death. The Commissioner of the district intervened and induced them to make a partition of the immoveable property. Under his advice and with his approbation, the deeds of partition were executed on the 30th December 1840, and that which was executed by Modenarain is at page 76 of the record. It specifies the different villages which fell to the lot of Heetnarain and Modenarain respectively; and also the sums which each, as between him and his brother, was bound to pay in respect of the *sudder jumma* or Government Revenue. The partition, however, was not made upon the principle of dividing each mehal, with the burthen of the public revenue assessed thereon, in the proper proportions, but of assigning certain villages and parcels according to their real or supposed value to each share, so as to give to Heetnarain $\frac{9}{16}$ ths in value, and to Modenarain $\frac{7}{16}$ ths in value of the whole immoveable property. In consequence of this mode of division, in six out of the nineteen mehals which had been held by Mitterjeet Singh in severalty, Modenarain took more than a nine annas share (his share in some of them being absolutely much larger than that of his brother), with the liability of having to pay a corresponding share of the public revenue assessed on those mehals. This deed of partition, which was confined to immoveable property, made no mention of the compensation for the pilgrim's tax; and the *jumma* or revenue stated therein to be chargeable on the different mehals, and to be apportioned between the brothers as therein mentioned, was the full amount of *jumma* assessed upon them under the Perpetual Settlement. It follows, then, that as far as this partition went, the compensation for the pilgrim's tax was not included therein, and presumably continued to be one of the assets of Mitterjeet Singh divisible between his sons in the proportion of nine to seven annas.

In Mitterjeet Singh's life-time the payment of this annuity would have been very simple; he had annually to pay a very large sum (upwards of three lacs of rupees) for Government Revenue, and would naturally have retained the 17,212 rupees by way of deduction or set-off. It would seem, however, that in his life-time, or very shortly after his death, the Revenue Authorities of the district entertained the notion of putting, in some way or other, this payment against the *sudder jumma*, in respect of the nineteen mehals held by him in severalty, distributing the whole sum of 17,212 rupees amongst the different mehals according to the *jummas* assessed upon them respectively. This appears from the letter of the Accountant of the Revenue Department, which is at page 198 of the record, and purports to be in answer to a letter from the Collector of the 22nd October 1840, which is not in evidence. The Accountant's letter is dated the 26th December 1840, and is in these terms: "I have the honor to acknowledge the receipt of your letter No. 344 of the 22nd October last, and, with reference to the seventh paragraph thereof, I beg to acquaint you that, on examining the items rateably distributed by you among the several mehals in your statement, trifling errors have been discovered to exist in almost every item. I accordingly transmit herewith a copy of your statement with an additional column added to it, showing the calculations made in this Office, agreeably to which you will have the goodness to allow the remissions in favor of the several mehals. I have used the term *remissions*, though, as far as the course of entry is concerned which the settlement with the Rajah will render necessary, no remissions in account will appear; for the compensation in question to the Rajah's heirs, you will be pleased to recollect, will have to be charged under the head of sayer compensation, subordinate to pensions, the charge being balanced by a distinct credit *per contra* 'to land revenue' (the estates being in your district *townjee*). This course of entry, you will observe, will prevent you from exhibiting the transaction in account as a 'remission.'"

By a proceeding dated the 23rd March 1841, the Collector directed that effect should be given to the letter of the Accountant, and that the 17,212 rupees 9 annas 5 pies should be credited on the 1st April of the current and of every future year to the *mouzahs* of each lot, as was specified in the letter of the Accountant, that is, on the list of *mehals* annexed to it; but it appears that in April 1841, and again on the 31st of March 1842, a warrant was written for the whole sum of 17,212 rupees 9 annas 5 pies, and this settlement of accounts was, therefore, in the nature of a set-off of one independent demand against another, and did not imply the permanent remission or deduction of part of the *jumma* originally assessed on the several *mehals*.

On the 6th June 1842, the Secretary of the Government wrote to the Accountant that the remission of the 17,212 rupees 9 annas 5 pies was to be adjusted by reduction of the *jumma*. The letter is in the following terms:—“With reference to the communication made to your Office from this Department under date the 16th January 1840, I am directed to inform you that the Hon'ble the Deputy-Governor of Bengal has this day been pleased to determine that the remission granted to Rajah Mitterjeet Singh shall be adjusted by a reduction of the *sudder jummas* of the estates recorded in his name on the Behar Collector's *toujee*.” And a letter to this effect, of the date of 14th June 1842, was sent to the Collector of Behar. Whether that Court was right in this statement, their Lordships, not having the letter of the 16th January before them, are unable to determine.

This order of June 1842, for adjusting the remission by a reduction of the *jumma*, apparently rendered a change in the mode of stating the accounts necessary; but in fact no alteration was made in them down to the year 1850. This appears from a letter to the Collector of Behar of the 17th of September 1850. Part of that letter is in these terms:—“As regards the mode of adjusting the remission still observed by you, I beg to remark that instructions from this Office, based upon the orders of Government of the 6th of June 1842, were, under date the 14th idem, issued to you, wherein you were requested to account for the remission by a reduction of the *sudder jumma* of the estates recorded in the name of Rajah Mitterjeet Singh on the *toujee* of your district,” which instructions apparently set aside those contained in letter No. 426 of the 26th December 1840. It would seem that, after this communication, the Government accounts were kept in accordance with the Government letter of the 6th of June 1842, which is obviously treated as having introduced a mode of accounting for the compensation for the pilgrims' tax differing from that established by the Accountant's letter of the 26th of December 1840, in that it proceeded less upon the principle of set-off, and more directly upon that of remission of revenue. Assuming, however, that the order so to deal with the compensation was within the competence of Government as a direction to their Officers for the more convenient mode of keeping their accounts, or otherwise, how could that affect the rights of Heetnarain Singh and Modenarain Singh *inter se*?

The Government might keep their accounts in any manner they pleased, but the 17,212 rupees would still continue to be the property of the brothers in the settled proportions, unless they acquiesced in the course adopted by the Government and acted upon it in such a way as to indicate a fresh agreement between them. Now, there is no evidence that Heetnarain Singh ever assented to this arrangement, or that he ever agreed to alter the proportions in which the property was originally divided. On the contrary, on the 15th April 1843 (and no action can have been taken on the letter of June 1842, until the 1st of April 1843), he presented a petition to the Collector, in which he complained of his being called upon to pay a larger sum than was due from him for the *jumma*, and praying relief. That petition was rejected. He then appealed to the Commissioner, and the Commissioner, in refusing to interfere, said:—“It appears that the *malikunah*

allowance has been rateably credited to the revenue of the mehals of both the parties. If there is a diminution in their respective shares, as opposed to the fixed allotment of share, let them adjust the differences among themselves; Government has nothing to do with this. The Collector is to communicate this to both the parties." Accordingly, from the date of this order, until the commencement of these suits in 1853, Heetnarain continued to assert his right to $\frac{1}{3}$ ths of the 17,212 rupees 9 annas 5 pies, by retaining so far as he could, out of the sums which under the partition he was bound to pay as his share of the *jumma* assessed in the different mehals, his proportion of the remission allowed in respect of each particular mehal. The suit of Modenarain is brought to recover the sums which, according to his contention, were in this manner improperly retained by Heetnarain, in satisfaction of his full proportion of the remissions allowed in respect of three of the mehals, whilst the three suits of Heetnarain are for the recovery from Modenarain of the differences between the sums actually returned by him, and his full $\frac{1}{3}$ ths of the remissions allowed in respect of three other mehals. The deed of partition, as has already been shown, made no alteration in the original rights of the parties, and the observations of the Principal Sudder Ameen in this respect are perfectly correct. It is to be observed also that Modenarain Singh, in his plaint filed on the 8th April 1853, as to the three mehals of which Heetnarain had received his $\frac{1}{3}$ ths, does not found himself upon any new agreement between them, but upon the authority of the Government order of June 1842. The ground upon which the Sudder Court proceeded in overruling the decree of the Principal Sudder Ameen in appellant's favor was "that the parties were aware that the remission of the *jumma* had been made, and that there was a deduction from certain specified mehals, and that the amount of remission from each of these mehals had been ascertained and determined, and that it was therefore a reasonable inference from the silence of the deed of partition on the subject that the parties believed and were willing that the amount of remission on each estate should be apportioned to the amount of *jumma* for which each of the contracting parties was responsible." There is, however, not the slightest proof that, when the deed of partition was in preparation (the consent to an amicable adjustment in which it resulted having been given on the 24th December 1840), or even at the time of the execution of the instrument on the 30th December 1840, the parties were aware of the mode in which the Government accounts had at that time been made out. The letter of the Revenue Accountant of the 26th December 1840, can hardly have reached the Collectorate of Behar before the 30th December, and the proceeding of the Deputy Collector, at page 197 of the Record, shows that that letter was not taken into consideration by him until the 4th January 1841, and that no final orders were passed thereon until the 23rd March 1841. But even if the parties, at the time when the deeds of partition were executed, had known of the letter of the 26th December 1840, they would have had no notice of the determination on the part of the Government to settle the account by way of reduction or remission of *jumma*. The arrangement was effected by the letter of Government of the 6th June 1842, and it is treated throughout the proceedings as differing materially from that contemplated in the letter of December 1840. It is in the letter of 1842 that Modenarain in his plaint founds his claim, and the sums which he sought to recover were those retained by Heetnarain after the date of it.

The Sudder Court puts the case of the sale for arrears of revenue of one of the lots on which a reduction of *jumma* had been allowed, and the danger of the Government Revenue suffering from a doubt whether the parties would consider themselves obliged to give up so much of a remission which they now enjoy, or would expect the Government to submit to the loss of revenue consequent on treating the *jumma* on the mehal as permanently reduced by the amount of the remission now allowed. But it is difficult to understand how, because in a supposable case the Government may be thrown into a state of uncertainty with respect to the mode

of dealing with the reduction, this can have any influence on the rights of the parties between themselves.

Their Lordships are of opinion that the view of the case taken by the Sudder Court cannot be adopted, but that the 17,212 rupees was divisible between the brothers in the proportion of nine-sixteenths and seven-sixteenths, and that, in whatever mode the Government may think proper to deal with this sum with reference to the *jumma*, the rights of the parties cannot be affected without their consent, but will continue to be adjusted according to the proportions originally established.

Their Lordships will, therefore, humbly recommend Her Majesty to reverse the decrees of the Sudder Court in all the four suits, and to affirm the decrees of the Sudder Ameen in all those suits, and with costs.

Mr. Rolfe.—The costs of the Court below and the costs here?

Lord Chelmsford.—All costs.

The 15th December 1865.

Present:

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Presumption of Hindoo Law—Separate acquisitions of property by a Member of a Joint Family.

On Appeal from the Sudder Dewanny Adawlut in Calcutta.

Frankishen Paul Chowdhry,

versus

Mothoora Mohun Paul Chowdhry.

The presumption of Hindoo Law is that property not shown to be separate is joint. Where an elder brother is long in the management of the joint estate and in the receipt of the collections from it, and is accountable for them to his younger brother, if the monies employed in the purchase of certain talooks formed part of those drawn from the joint estate, the younger brother, on a re-union, is entitled upon the general principles of Hindoo Law, and independently of the express provisions of any deed of agreement executed between the parties, to share in them as acquisitions made by the use of the joint funds.

THEIR Lordships are of opinion that no ground has been shown for disturbing either of the decisions below, and, therefore, they do not think it necessary to call upon the respondent's Counsel.

The case turns almost entirely upon the construction to be given to the deed of *Onghshobdhareet* at page 10 of the record. That deed not only defines the rights and obligations of the parties, but it contains a narrative of the facts of the case upon which we can rely, as it is a statement in which both parties joined, at a time when there was apparently no difference between them.

It appears, then, from that deed, that this was a joint Hindoo family, consisting of the appellant and the respondent, and a younger brother of the half-blood, who was a minor, and is since deceased. They were, in all respects, a joint and undivided family. In the year 1254, there were disputes between the adult brothers, and they separated, but there was no regular partition of the estate. The effect of the separation was that the lands remained undivided, but each brother, being no longer a member of a joint Hindoo family, took his share of the rents.

It appears from other parts of the record, and although it is not very distinctly stated in the deed, it would almost follow from the nature of the case that the younger brother had then a large claim against the elder brother, who had been the manager of the estate, in respect of the rent and profits received previous to the partition. That is stated distinctly in the judgment of the Sudder Court where the Judges say—"We find that the plaintiff's pleader admits that, up to 1253, his client, as elder brother, made all the collections, and held all the joint funds of the

family; that, although a separation took place in 1253, and the plaintiff was bound to give a full and honest account of his management, no such accounts were ever rendered for the satisfaction of the brother defendant."

The separation of the two brothers continued for little more than eleven months; they then agreed to come together again, and this deed was executed. The deed states that, during that period, the elder brother had entered into a treaty for the purchase of the putnee talooks, the price of which is the subject of the present contention; and further, that the youngest brother having died, and his mother having taken his share by inheritance, Frankishen Paul Chowdry had purchased that share from her, subject to an annual payment of 1,200 rupees.

On the re-union of the two brothers, which of itself remitted them to their former *status* as members of a joint Hindoo family, it was expressly agreed that those acquisitions which the elder brother had made whilst the separation continued, should all go into the joint fund, and the deed provides the terms upon which that should be done.

Now, the material parts of the deed, with respect to these transactions, are these: *first*, there is a recital "that I, Frankishen Paul Chowdhry, by contracting loans, negotiated to take in putnee Turruff Munsebpore and Dehee Rajahpore *benamee* in the name of my relative Sumboo Chunder Singh, inhabitant of Dowlutgunge, and advanced the *byana* or earnest money." Then it states—"Afterwards a settlement was effected between us brothers, and again the entire property came into our *ijmaltee* possession, as it had been before, and the putnee, &c., that had been recently purchased, also came under the *ijmaltee* settlement, and of the balance of the consideration or purchase-money of the aforesaid Munsebpore, &c., taking no putnee, some was paid by us two from our private funds, and some portion by loans raised on bonds given by us respectively, and by granting dur-putnee pottahs, and we obtained a pottah of the said putnee, and both brothers remained in *ijmaltee* possession, having taken from the aforesaid Sumboo Chunder Singh an *ikerar* or acknowledgment of the *benamee*; at present we two brothers having brought under *ijmaltee* the entire hereditary and acquired property, and that which has been recently acquired as putnee, and all real and personal property, have made this condition and settlement that from hence the whole is to remain *ijmaltee*, and that such property of the share of Ramkishen Paul as I, Frankishen Paul, had purchased and held under a perpetual pottah was likewise to become *ijmaltee*, and held by us in possession in equal shares, and that we two brothers will pay the profits of the said property to our step-mother, and that whenever we, or our heirs, share and take the aforesaid and other property, we, or our heirs, in such case, shall equally share and take our said deceased half-brother's property, and not more, and the shares of the same shall never be more or less."

In short, it is expressly provided that the entire property, whether ancestral, or then acquired, or thereafter to be acquired, is to be joint and enjoyed in equal moieties. Then follow certain directions for the management of this joint estate, including provisions for giving the elder brother a larger share in such management, all of which are immaterial to the present case.

Then follows that which appears to their Lordships to be one of the most important provisions in the deed. It is to this effect:—"All the money that has been borrowed on our joint bonds, and that which I, Frankishen Paul, had borrowed during the time of our separation, on bonds given in my own name, and which said money has been paid as the consideration or purchase-money for the putnee of Turruff Munsebpore and Dehee Rajahpore, shall all be accounted as our *ijmaltee* debt, and the said *ijmaltee* debt shall be liquidated by us out of the profits of the *ijmaltee* property." As their Lordships understand that stipulation, it provided that whatever Frankishen Paul had borrowed on bonds given in his name, or whatever the two had borrowed on their joint security, in order to provide the consideration-money paid for the purchase of these two putnees, should be a charge on

the joint estate, and should be liquidated out of the joint property, but they can find in that no provision whatever for the re-payment, out of the joint property, or to the elder brother, of any funds which he might have advanced, or might have alleged that he had advanced, on the same account, out of his private money. The deed is, upon that point, entirely silent, and, as one of their Lordships observed in the course of the argument, it would be a strange thing to infer from this silence an implied promise to pay the sum sought to be recovered in this suit.

Then follow provisions to which we shall afterwards refer, providing for the event of a subsequent disagreement between the parties, and a second partition, and then comes this stipulation :—" No party shall make any claim hereafter upon the other on account of any cash having reference to the former *ijmullee* period, that is, for the time anterior to the year 1254, B. S. I, Frankishen Paul, have no claim upon you, Nobokishen Paul, on account of the price of the real and personal property of Ramkishen Paul's share, for which I had obtained a perpetual pottah, and which I had obtained in the way of a purchase, and whatever writings have been executed and given by me to our step-mother, we both shall be bound to comply with the conditions thereof." Now, those last words show that, although Frankishen Paul may have paid out of the money which he had collected formerly, or out of private resources, or in any way, for the share of his half-brother, yet he throws all that into the joint concern, and there is no claim to be made upon the younger brother in respect of that acquisition. That is express. Again, there is, no doubt, a general covenant or agreement that no claim shall be made upon him in respect of any monies for which he may have been accountable in respect of those earlier collections. And Mr. Leith relies upon that as an answer to that portion of the respondent's case, which rests upon the assumption that the monies which are in dispute came out of these former collections, and were applied by Frankishen Paul to the purchase of the putnee talooks. But it seems to their Lordships that the whole deed must be taken together, and as one general compromise; and if they are right in their construction of the former Clause, that there was no provision made for the payment or the adjustment of the price of the putnees, except in so far as it consisted of borrowed money, which was to be paid out of the assets of the joint estate, then, when they find afterwards an agreement that there shall be no account in respect of the former collections, the two must be taken together, and must be construed to import that whilst, on the one hand, the elder brother makes no claim in respect of any monies which he may have applied in that way, so, on the other hand, the younger brother says, I will make no claim for any monies *ultra* that, and I will treat the whole account as settled and closed by this arrangement.

Therefore upon this deed, if it stood alone, it would be very difficult to say how the present claim could be supported.

We find, however, that the case which the parties contemplated really happened, and that after a short period of re-union they again separated, and the deed of partition which, though not printed in the record, has been produced to-day, and is now before us, was executed. We find in that deed no provision at all for such a claim as this, while we do find a provision for the payment of those debts which, upon the construction which we have put upon the Clause at line 20 of page 11, really would fall upon the joint estate. That provision imports "that the money borrowed under simple and mortgage bonds is to be liquidated by both in equal portions." Therefore, the subsequent deed of partition seems to be entirely consistent with what was contemplated by the former deed, and does not in any way re-open any of the accounts settled by that deed.

It would, then, as it seems to us, be extremely difficult to support the case made by the appellant, even supposing that the funds in question were really his private funds. If, indeed, the sums mentioned in the *jumma-khurruch*, which seems to have been used originally to meet the fraudulent claim of the trustee, to

hold the putnee talooks as his own, if those sums, though described as coming from the private funds of the appellant, had been alleged and proved by him in this suit to have been money actually borrowed on bond or otherwise, and had been so brought within the stipulation of the deed, the case would have been very different. But no such issue was raised by the appellant.

The issue of fact upon which the parties went to trial, was raised by the other side, and, as ultimately settled, was this, "whether it was true that the plaintiff had, out of his own funds, paid the sum of 20,120 rupees, or that the said amount had formed a part of the *ijmaltee* funds of the two parties." The appellant gave no evidence on this issue; the respondent examined four witnesses upon it, and it was found in his favor. Their Lordships have no doubt of the propriety of that finding. It is not even alleged upon these proceedings that the parties originally had any separate property; the presumption of Hindoo Law in such cases is that property not shown to be separate is joint; and it is an admitted fact that the appellant was long in the management of the joint estate, had received the collections from it, and was accountable for them to his younger brother. And, if the monies employed in the purchase of the talooks formed part of those so drawn from the joint estate, it follows that the respondent on the re-union was entitled, upon the general principles of Hindoo Law, and, independently of the express provisions of the deed, to share in them, as acquisitions made by the use of the joint funds.

Their Lordships are, therefore, of opinion that the decrees of the Courts below were right; and they have no difficulty in determining humbly to recommend to Her Majesty that this appeal be dismissed with costs.

The 16th December 1865.

Present :

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Limitation (Punjab Code)—Admission of debt—Part payments.

Shah Mukkum Lal and others,

versus

Nawab Imtiazood-Dowlah and another.

Under the Punjab Code, and before Act XIV of 1859 took effect in Oude, letters offering to pay a debt by instalments, and praying to be excused from the payment of interest, are an ample acknowledgment of the debt to save limitation.

Under the same Code, payments made by an agent upon account, and continued monthly for several months, ought to be regarded as tantamount at least to, if not correctly described as, a running account, and are therefore part payments which amount to "a partial satisfaction of demand" whereby the period of limitation is renewed.

THE printed cases both of the appellant and respondent assume that the question upon the appeal is to be governed by the new Law of Limitation in the Act XIV of 1859. But the last Section of that Act provides that the Act "shall not take effect in any Non-Regulation Province (to which class Oude belongs), until it shall be extended thereto by public notification by the Governor-General in Council; and that, whenever it shall be so extended, all suits within such Province, which shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed." In a case from Oude which was recently before the Judicial Committee (the case of Saligram and another *vs.* Mirza Azim Ali Beg, decided on the 12th November 1864), it appeared that the Act XIV of 1859 was not extended to Oude till July 1860. As this suit was commenced on the 13th January 1862, it falls within the exception, and must be determined as if the Act had not been passed.

In the case just referred to, in which the question arose what Law of Limitation was to be applied, it appeared that, since the annexation of the Province, various

rules of limitation had prevailed ; that, in 1857, suits of the nature of the present one were subject to a limitation of six years, and to the general provisions of the Punjab Code ; that, in March 1859, these rules had been modified by a Circular Order No. 51, which had afterwards been repealed by a Circular Order No. 104, dated the 4th July 1860 ; and their Lordships held that the case before them was to be governed by the last mentioned Order. Upon the authority of that decision, it appears that this case must fall within the 10th of the Rules then promulgated under that Order. This declares the period of limitation to be three years "in all suits for money lent for no definite period or for interest thereon, unless there is a written engagement, and, where Registry Offices existed at the time, such engagement was registered and signed by the party to be bound thereby, or by his duly authorized agent."

The rules which were promulgated under this Circular Order were modifications of the Punjab Code which previously existed, and therefore it may be necessary in this case to resort to that Code for the purpose of determining the time from which the period of limitation is to be calculated, or the circumstances which will take a particular case out of the operation of the limitation. Having ascertained the law to be applied in this case, we proceed to consider the question to be decided.

The suit was instituted by the appellant, carrying on business as a merchant at Lucknow, to recover a balance of 11,278 rupees 3 annas, principal moneys and interest, alleged to be due from the first-named respondent on account of advances made to him for the maintenance of his family through his agent, the other respondent, Hajee Ali.

The plaint was filed on the 13th January 1862, and the last advance was in 1858 : consequently more than three years before the commencement of the suit.

Issues were settled by the Judge, the *first* of them being "limitation ;" and the case was ultimately decided upon the question whether the plaintiff had given sufficient evidence of an admission of the debt by the respondent to prevent the application of the period of limitation to his claim.

In order to prove such an admission, the plaintiff produced three letters, marked respectively B, D, and F. B appearing by its own date, and the other two letters by the post-marks upon their envelopes, to have been written in the year 1860. The letter F purports to be signed by the Nawab, but has no seal. The other two letters have neither signature nor seal ; but the envelope of D bears to have been "despatched by Imtiazood-Dowlah Bahadoor from Khizzirpoor in Calcutta." Letter F is stated to have been filed with the plaint, but no attempt was made to prove that it was signed by the Nawab. No other evidence was given of the letters B and D, except by Hajee Ali who was called by the plaintiff, and said "B came to the plaintiff, not through me ; D ditto." This was perhaps scarcely sufficient to admit them to proof, but the Judge received them, and then the question arose whether, being admitted, they did not carry with them internal evidence of their genuineness. There can be no doubt that, when the Nawab left Lucknow, his family remained behind, and would require to be maintained during his absence. Hajee Ali was appointed his agent by a *mookhtearnamah* sealed with his seal, in which it is contemplated that money would be borrowed from the appellant's firm, and Hajee Ali, besides this authority, was armed with blank pieces of paper impressed with the Nawab's seal, to be used when required. It is not pretended that the family were maintained out of the funds of the Nawab, and no other source of supply was ever suggested, except that which was derived from the appellant. Under these circumstances, the debt to the appellant was incurred. His claim is for nothing else than advances made to meet the wants of the Nawab's family, with interest upon these advances. The Nawab was examined upon interrogatories. He denied all knowledge of the appellant. Asserted that he never had himself, nor permitted any one to have, any money transactions with him. That he was not aware that money had been advanced by the appellant, and that nothing was due

to him for principal or interest. It is impossible not to agree with the observations of the Civil Judge upon these answers of the Nawab. "That defendant was largely indebted to plaintiff through his old *Karindah*, Hajee Ali, there can be no doubt, and there is much perjury on that score in the defendant's deposition."

But if the respondent was indebted to the appellant through his agent, is it at all credible that he should have been ignorant of the fact, and that, knowing that his own funds had not been applied to the maintenance of his family, he should never have had the curiosity to enquire from what source the supplies were drawn? It is clear that he must have known that he was indebted to the appellant for the means of support of his family, and it is most improbable that, when the debt had grown to a large amount, and his own affairs had suffered considerably from the annexation of the province of Oude, no communication should have taken place between him and his creditor. Assuming the probability, in this state of things, that something would have passed between them, it will be found that the letters in question are precisely those which might have been expected to be written under the circumstances. They are in the following terms:

"TRANSLATION of a LETTER to the address of SHAHJEE.

"*Suit No. 77 of 1862. B.*

"DEAR SIR,—(After compliments.) I beg to inform you that I have received the account through your *gomashita* (agent), Lalla Sham Soonder, and become acquainted with its content. But, dear Shahjee, it is known to the world how we have been ruined; and you also are well aware of my circumstances, that no private property has been left to me, and I am obliged to manage my expenses (out of the salary which is allowed to me) the best way I can.

"A friendly intercourse and money transactions have been carried on between you and me for a long time, and there never took place any disagreement of any kind, and even now, please God, no difference will arise. I am every way willing to pay off your money, and have no objection on that head. But I wish you will, under present circumstances, receive from me the principal due to you by instalments; my means do not enable me to pay you the interest, and I will not be able to pay it. I have no hesitation or objection to pay you the principal sum. I shall suffer inconvenience, but please God, I will pay you your debt by instalments; but I certainly demur to pay the interest, because I do not know how to pay it. Under such circumstances, it becomes you also to give up your claim to interest, because you and I having been on friendly terms for a long time, it is nothing but proper that you should show me such consideration. After the revolution that has taken place in our affairs may God enable me to pay off your principal debt. I will consider myself very fortunate and thank God if I succeed in liquidating it.

"Dated 20th Suffer, 1277 Hijree.

"*Postscript.*—Having stated above that I am ready to pay you by instalments, I take this opportunity to let you know that I can arrange to liquidate your debt by monthly instalments of 200 rupees each, to be paid to you, please God, monthly, through your agent, when I receive my allowance from the British Government."

"TRANSLATION of a LETTER to the address of SHAH MAKHUN LAL.

"*Suit No. 77. D.*

DEAR SIR,—(After compliments.) I beg to inform you that, before this, I wrote to you that I could pay the principal by instalments, but that you would excuse me for the interest, but you have not yet sent me any satisfactory answer. I, therefore, write to you again that a friendly communication and money dealings have existed between you and me for a long time, and that no disagreement ever arose, nor did I make any objection in my dealings with you. I did whatever you told me. But my objection to pay you the interest now arises from my being involved in ruined circumstances, which is known to the world, and even you yourself are well aware that I have been robbed of all the private property I had, and that nothing is left to me. My salary was stopped for a long time; but, as it is now allowed, I am ready to pay off your principal without any hesitation, although I shall suffer much inconvenience, even by paying your principal money, because God knows how I manage my expenses in so small a sum. Hence, under the present state of affairs, when times have been so much changed, it is nothing but proper that you should have regard to the friendly intercourse which has subsisted for a long time between you and me, and not demand the interest. You should show me some consideration, and receive the principal due to you by instalments. Pray do not withhold your kindness in this respect, and, under present circumstances, consider it a booty if you have your principal debt liquidated. I am unable to pay the interest, and can by no means pay it. Otherwise I would have made no objection to discharge the interest, and would have paid it. You should send me an early answer."

"TRANSLATION of a LETTER to the address of SHAHJEE.

"*Suit No. 77. F.*

"DEAR SIR,—I wrote to you frequently asking you to return me the whole of my bonds, and to have one drawn in lieu of them; that I can pay you interest at the rate of 8 annas per cent; that you should make up your account, and have one bond executed for the aggregate sum, and that you should receive payment from me by monthly instalments of 200 rupees each, and I told the same to your agent; but I am surprised to find that neither you have written to me anything on the subject up to this time, nor has your agent given me any answer.

"I am, therefore, under the necessity of writing to you again, and request you will send all my papers, consisting of bonds, &c., which you have in your possession, to your agent here, who may return them to me, and have one bond executed in lieu of all of them. I also wish that your agent may be allowed to receive from me the instalments of 200 rupees a month promised by me, which I am ready to pay. Please send me without any hesitation, an immediate and complete reply as soon as you receive this letter."

(Signed)

"IMTIAZOOD-DOWLAH BAHADOOR.

Assuming, then, the genuineness of these letters to be thus established, the question arises whether they contain a sufficient admission of the debt to prevent the application of the period of limitation to the appellant's suit. As the Judges below seemed to regard the letter F. as probably not genuine, and some suspicion may rest upon it, it will be better to confine the consideration of this question to the letters B and D. Their Lordships entertain no doubt that, if the question were to be tried by the rules of English Law before Lord Tenterden's Act, these letters offering to pay the principal money by instalments, and praying to be excused from the payment of the interest, would be an ample acknowledgment to take the case out of the Statute of Limitations, and they are not aware of anything in the Punjab Code which would lead to a different construction. The Judges in the Courts below dealt with the questions rather summarily, and disposed of the case without affording the appellant an opportunity of supplying any deficiency which they found in his proof. But if they proceeded upon the Act for the limitation of suits, No. XIV of 1859, and both the Civil Judge and the Judicial Commissioner thought that letter F was out of the question, their conclusion was right, because letters B and D being without signature, there was no acknowledgment in writing signed by the party to be charged. But that Act not being applicable, and an admission of the debt being all that was requisite to save the limitation, even if letter F were put aside, the letters B and D being before the Judges, they ought to have considered them and determined whether they were sufficient to prevent the plaintiff's remedy being barred. To this consideration their minds were never applied, and in dealing with another point which arose in the case, there seems to have been a miscarriage. It was proved by Hajee Ali that the Nawab's brother, Hadee Ali Khan, paid the appellant 1,700 rupees in two sums after he became agent. The Civil Judge appears to have entirely overlooked this fact. But the Judicial Commissioner, dealing with the argument that the period of limitation should be calculated from the last of these payments which was made on the 14th July 1859, observed that "a period of limitation cannot now be renewed by a payment unless it be made at a time specifically conditioned." It is difficult to understand to what Code the Judicial Commissioner was referring when he made this observation. In the Act XIV of 1859, there seems to be no provision giving effect to a payment on account of partial satisfaction. The Punjab Code, Part II, Section I, Clause 6, limits suits to a certain time after the cause of action shall have arisen, unless (amongst other things) the complainant has "obtained an admission or partial satisfaction of his demand from the opposite party."

But from Clause 7 it appears that it is not every part payment which will amount to "a partial satisfaction of demand" within the meaning of the rule. It must be a payment according to a regular and continuous course of dealing, "something tantamount to a running account." It was this qualification which the Judicial Commissioner probably had in his mind when he made the observation; but if he

meant to apply this Code, and had turned to the words of it, he probably would have thought that the payments made by the defendant's agent upon an account, continued monthly for several months, ought to be regarded as tantamount (at least) to a running account, if not itself correctly described as a running account.

The case has not been properly dealt with, nor fully and sufficiently considered in the Courts below, and in their Lordships' opinion it ought to be submitted to further and more careful investigation. They will, therefore, recommend to Her Majesty that the decrees be reversed, and the case remitted to the Court below for trial of the issues between the parties.

The 22nd December 1865.

Present :

Lord Chelmsford, Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colville, Sir E. V. Williams, and Sir L. Peel.

Compulsory Arbitration—Appeal—Waivor.

On Appeal from the Judicial Commissioner of Oude.

Seonath *alias* Burray Kaka,

versus

Ramnath *alias* Chotay Kaka.

In appealing to set aside an award of arbitrators which the appellant contends is not binding upon him, he is not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award.

Both the Code of Civil Procedure and the Punjab Code require the consent of the parties to a reference to, and the appointment of, arbitrators.

A party, by appearing before arbitrators appointed without his consent, and in spite of his repeated remonstrances, does not forfeit his right to question the validity of their award.

THE appellant and respondent are first cousins, and natives of Lucknow, and were formerly jointly interested in certain ancestral property, and in the business of three *kotees*, or firms, the styles of which were Hurjus Roy and Gungaram, Gungaram and Juggurnath, and Sheonath and Ramnath. Each appears to have been also possessed of separate property.

In 1859, they made a partition, as far as they then could, of their joint property; and on the 16th of September of that year, they interchanged *farighkuttees*, or instruments of mutual release, of which that executed by the respondent is at page 4 of the record. This document, after stating that the two parties were jointly interested in the before-mentioned firms, and had settled the accounts of them amicably, and had made an equal division of the entire ancestral property, moveable and immoveable, cash, promissory notes, &c.; and after formally abandoning all claims on account of the said firms against the appellant and his heirs,—contained this passage—"But I have a claim to an equal share of such moneys as may be realised on account of debts due to these firms on this date, and I also hold myself liable for a moiety of such sums as may be due by these firms up to this date."

In 1861, there was a dispute, the precise nature of which is not disclosed, between the cousins respecting the division of the paternal estate, and the debts due to or by the firm of Sheonath and Ramnath; and they agreed to refer the matters in dispute to the arbitration of five persons, named Hyder Hossein Khan, Meer Wajid Ali, Mr. Jacob Johanness Shah Mukhun Lal and Gridharee Lal. A written agreement to this effect was executed by each on the 8th of May 1861, and both documents are in the Appendix; but the appellant afterwards drew back from his agreement, and refused to have it registered; and nothing came of this attempt to settle the dispute by arbitration.

In September 1861, the respondent Ramnath instituted this suit against the appellant. The plaintiff sought a general account and partition; it alleged that

no account had ever been settled between the parties; it mentioned the execution of the *farighkuttees*, but alleged that there had been no partition as stated in them; that the partition was intended to take effect after a settlement of accounts, when the *farighkuttees* were to have been registered; and that, in the meantime, they had remained with the appellant as incomplete instruments. It referred also to the agreement for a reference to arbitration, but only as evidence that the whole property still remained undivided.

The cause was tried by the Civil Judge of Lucknow, with the assistance of a Jury, and his decree, founded on the findings of the Jury, established that there had been an actual partition and division of the joint property; that the *farighkuttees*, had been executed on the footing of it, without taint of fraud; and that the respondent had failed to prove that he had any interest in a fourth firm, which the appellant carried on under the style of Ramnath Rughonath. It also decided against the respondent a question in the suit touching the profits made by the appellant by means of sale and purchase of Government Notes during the rebellion.

The respondent appealed against the decision to Mr. Campbell, then the Judicial Commissioner, who, by his order of the 15th of May 1862, affirmed it on all the points raised by the appeal. His judgment, however, contained these passages:—"But it seems clear that there is one account between the parties still quite unadjusted, *viz.*, the division of the outstandings which was left open at the time of the division of assets. I think it would be proper that a sum in satisfaction of all claims on this account should be awarded to plaintiff, so as to settle the matter, and I remit the case to the Judge to decide that point. If possible, a decision should be obtained from the arbitrators previously appointed by the parties." And again—"There was something very considerable to be settled that still remains to be settled, and I trust that, in accordance with my order, the Judge will manage, by a successful arbitration, to give the plaintiff a fair equivalent for his share in the outstandings of the three firms."

The effect, therefore, of this order was conclusively to limit the claim of the respondent to his share in the outstandings of the three firms; and to direct, or at all events to suggest, that that claim should be enforced, not by taking the accounts upon the footing of the *farighkuttees* in the regular way, but by giving him a lump-sum as the value of his interest therein, and that such value should be fixed by the award of the arbitrators to whom the parties had formerly proposed to refer their disputes.

The cause being thus remitted to the Civil Judge, that Officer on the 7th of June 1862, made an order whereby he referred to four out of the five arbitrators formerly named (the fifth, Gridharee Lal, having left Lucknow) the decision of the following questions:—*first*, what accounts remained unadjusted between the parties; *secondly*, what amount of outstandings remained then unrealised and undivided; *thirdly*, what amount should be given to the plaintiff (the respondent) as an equitable acquittance of his share therein? He directed the arbitrators to file their award within two days, and empowered them, should they be equally divided in opinion, to elect an umpire.

The appellant did not acquiesce in this order. On the 10th of June 1862, he petitioned the Judicial Commissioner against it. In his petition he stated that he had no objection to the order of the Appellate Court referring the question of joint but divisible debt to arbitration; but that he objected, on the grounds therein stated, to the arbitrators to whom the Civil Judge had referred the case, and requested that other arbitrators might be selected by the parties, and that his case be referred to them. The order of the Judicial Commissioner on this petition was in these words:—"It is in the Judge's discretion to employ the arbitrators formerly named by the parties, or to arrange new ones if he can. I do not think it possible that a complicated amount can be settled by a Jury."

The appellant being thus referred back to the Civil Judge, presented on the 13th of June a petition to the Officer, in which he reiterated his objections to the arbitrators named, and begged the Judge, as authorized by the Judicial Commissioner, to dismiss them, and to order "other arbitrators to be named, composed of such parties as I and the plaintiff may select." This application was, on the 23rd of June 1862, rejected by the Judge, who gave the following reasons for his decision:—"I see no reason to change. I acted on the Judicial Commissioner's order and transferred the case to the old *punches*. If their work, when it comes in, prove open to suspicion, or is anywise unsatisfactory, I shall not decide upon it, but I think it desirable to have the fullest light they can throw on the matter. If they are partizans, and go in favor of plaintiff unduly, they will still have to show grounds. If they go against the plaintiff, whose friends they are said to be, it will be all the more satisfactory to the defendant." Against this last order the appellant appealed by petition, dated the 25th of June 1862, to the Judicial Commissioner, whose order thereon was in these words:—"I will not interfere in this stage."

The appellant afterwards, and before any award was made, presented two further petitions to the Civil Judge. The *first* of them is dated the 22nd of July, the *other* the 19th of August 1862. In these, after referring to his ineffectual protests against the nomination of the particular arbitrators, and to the determination of the Judge not to change them unless they proved themselves partial and unfair, he objected to their mode of proceeding. And in the last petition he expressly asked that their award might be set aside, and that new arbitrators might be appointed in their stead, by which means justice might be done him.

The arbitrators filed an award about the 20th of August 1862, on which day it was returned to them by the Judge for amendment as to its form. It was filed in its amended form on the 25th of that month. Its effect was that the amount which the respondent could fairly claim from the appellant, in respect of the outstandings, was 66,090 rupees, besides one moiety of a judgment-debt which had been recovered in the Civil Court of Cawnpore, and was described as the *Rusdhan* decree. On the 4th of September, the award was discussed before the Civil Judge. He overruled the appellant's objections to it; observed that it did not include the sums due to the firms on mortgage, and that the question to what the plaintiff was entitled in respect of these must be referred back to the arbitrators. His decree was to this effect:—"I accept the decision of the arbitrators, awarding 66,090 rupees to plaintiff as equivalent for all outstandings except the mortgages, and half of the *Rusdhan* decree."

Against this decree the appellant, on the 16th of October 1862, appealed to the Judicial Commissioner. The order passed by him on the following day was in these words:—"Case is not completed. Appeal will be heard when the whole is complete."

On the 20th of December 1862, the arbitrators, to whom a fifth (*Ihtimamood Dowlah*) seems to have been added, made their award in respect of the mortgages. The effect of it was that a further sum of 15,000 rupees should be paid on this account to the respondent by the appellant.

On the 22nd of December 1862, the Civil Judge adopted this finding in spite of the appellant's objections, and ordered that he should, within three months, make good this sum, as well as those which, by the decree of the 4th of September, he had been ordered to pay.

The appellant appealed also against this decree to the Judicial Commissioner. His petition of appeal, which is dated the 16th of March 1863, states, amongst other things, that the arbitrators had been challenged by him both in the Lower Court and in the Judicial Commissioner's Court. This appeal, and that against the decree of the 4th of September 1862, of which the consideration had been postponed, was brought before Mr. Couper, who had then become Judicial Commissioner in the

place of Mr. Campbell, and he, on the 3rd of July 1863, upheld the awards of the arbitrators, and affirmed both the decrees of the Civil Judge.

Against this decision the present appeal is brought.

Their Lordships will assume,—and such is, in fact, their opinion upon the facts before them,—that, if the questions which the arbitrators have determined were properly referred to them, no sufficient grounds for impeaching their award have been established. It has, however, been strongly urged at the Bar that it was not competent to the Judicial Commissioner, except with the consent of both parties, to vary, as he did vary by his order of the 15th of May 1862, the rights of the parties under the *farighkuttees*, and to impose on the appellants the obligation of purchasing the respondent's interest in the outstandings on a rough estimate of its value. Another objection to the proceedings—and it is that on which the petition of appeal chiefly insists—is that the nomination of the particular arbitrators by the Judge without the consent and against the repeated protests of the appellant, was altogether irregular, and that their award is, therefore, not binding upon him.

Their Lordships do not deny the force of the arguments addressed to them on the *first* point, but they are nevertheless of opinion that the determination of this appeal must depend upon the validity of the *second* objection; because, if the nomination of the arbitrators were regular, there is evidence in the petition of the 10th of June, and in other parts of the proceedings, that the appellant accepted the issue proposed by the Judicial Commissioner, and was willing that the accounts between him and the respondent should be settled on that principle and by arbitration.

That both points are open, to the appellant, although he has in terms appealed only against the final decision of the Civil Judge and the confirmation of it by the Judicial Commissioner, is, we think, established by the case of *Maharajah Moheshur Sing vs. the Bengal Government* (7 Moore's I. A., p. 302). The appeal is, in effect, to set aside an award which the appellant contends is not binding upon him. And, in order to do this, he was not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award.

Was it, then, competent to the Judge to refer the decision of this question to arbitrators selected by him against the will and in spite of the repeated remonstrances of the appellant? When the suit was commenced, the powers and procedure of the Courts in Oude were still regulated by the rules and ordinances which had been passed by the Governor-General in Council in order to provide for the administration of justice in the province on its first annexation. These were substantially the same as those which had previously been in force in the Punjab, and were known as the Punjab Code. But on the 6th of August 1861, the Governor-General in Council, by a notification issued under the 385th Section of Act VIII of 1859, extended to the Province of Oude, the provisions of that Act (which is generally known as the Code of Civil Procedure), subject to certain exceptions and provisions, as from the 1st of January 1862. The exceptions are only five in number; they are modifications of the 3rd, 17th, 111th, 172nd, and 205th Sections of the Act, and none of them have any bearing on the questions raised by this appeal. At the date, therefore, of the Judicial Commissioner's order of the 15th of May 1862, the Code of Civil Procedure had thus been extended to, and was in force in Oude.

* The 388th Section of that Code provides that, from and after the time when this Act shall come into operation “in any part of the British Territories in India, the Procedure of the Civil Courts in such parts of the said territories shall be regulated by this Act, and, except as otherwise provided by this Act, by no other law or regulation.” The only exception, as to suits pending at the time when the Act shall come into operation, is contained in the preceding Section, and is in these words:—“If in any suit pending at the time when this Act shall come into operation, it shall appear to the Court that the application of any provision of this Act would

deprive any party to the suit of any right in reference to the procedure of the suit, whether of appeal or otherwise, which, but for the passing of this Act, would have belonged to him, the Court shall proceed according to the law in force before this Act takes effect." There is no expression upon the face of the proceedings of an intention on the part of the Judges below to suspend or modify the operation of Act VIII of 1859, by virtue of the provision last quoted, or otherwise. Nor is it easy to see how the compulsory reference to arbitration which is here complained of could have been brought within the definition of a right belonging to the opposite party. Moreover, that party himself in the proceeding, at page 61 of the record, appealed to certain Sections of the Act as establishing the finality of the award, thereby admitting that the reference was to be taken as made under the new procedure. Any larger powers, therefore, which the Judicial Commissioner and his subordinate may have possessed under the Punjab Code, must be held to have been superseded on the 15th of May 1862; and the only question is whether the subsequent proceedings were authorized by the Code of Civil Procedure.

The 312th Section of the Act provides that, if the parties to a suit are desirous that the matters in difference between them in the suit, or any of such matters, shall be referred to the joint decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference. The 314th Section provides that the arbitrator or arbitrators shall be nominated by the parties in such manner as may be agreed upon between them. If the parties cannot agree with respect to the nomination of the arbitrator or arbitrators, or if the person or persons nominated by them shall refuse to accept the arbitration, *and the parties are desirous that the nomination shall be made by the Court*, the Court shall appoint the arbitrator or arbitrators.

These Sections clearly import that the parties must either name the arbitrators or consent to the nomination of them by the Court. They are the only provisions which bear upon the subject; and it follows that the Code gives no authority to the Court to force upon a reluctant party the decision of any question in the cause by arbitrators selected at its discretion. It may be observed that the Punjab Code, Part II., Section 2, Clause 15, seems to require, as might be expected, equally with the Code of Civil Procedure, the consent of the parties to a reference to, and, the appointment of, arbitrators.

Their Lordships need hardly observe that, if the appointment of the arbitrators in this case was irregular, the irregularity was in no degree cured by the fact that they were four out of five persons to whom the appellant had, on a former occasion, agreed to refer the matters then in dispute between him and the respondent. That agreement to refer had proved abortive; the respondent's suit was not brought to enforce it, but for the determination of the rights of the parties by the Court; and the question referred to the arbitrators was an entirely new question suggested by the Judicial Commissioner.

Again, the appeal having been heard *ex parte*, their Lordships have felt bound to consider whether this case could be brought within the principle of those authorities which establish that a defect in the nomination of arbitrators may be cured by the waiver implied from the act of the party in going in before them, and taking his chance of a favorable decision. Their Lordships are, however, of opinion that the appellant cannot be held to have forfeited in this manner his right to question the validity of these awards. From what has been already stated, it appears that his protests and appeals were frequent, and were repeatedly rejected as inadmissible by the Judges. Whatever part he took in the proceedings before the arbitrators, he must be deemed to have taken under a continuing protest, and in self-defence.

Their Lordships, therefore, however much they regret the necessity of re-opening this litigation, feel bound to allow the present appeal.

It is not improbable that the decrees impeached give no more to the respondent than upon a proper adjustment of the accounts will be found to be his due.

But this result has been reached by referring a question which involves a compromise of the strict legal rights of the parties, to arbitrators who were not duly authorized to determine it. The consent of the appellant was essential both to the form of the issue and to the constitution of the tribunal that was to decide it. It was wholly wanting to the one; if given at all to the other, it was, at most, a qualified consent.

The only remaining question is, with what direction this cause should be remitted to the Courts below? It will, of course, be open to the Judge, if both parties consent, to refer the question suggested by the order of the 15th of May 1862, or any other question directed to the ascertainment of their respective rights in the outstandings, to arbitrators duly appointed under the Act of 1859. But if the parties do not consent to any such mode of settling their disputes, it will be the duty of the Judge to adjust the accounts still unsettled between them in the regular way, by taking an account of the debts which were due to, and from, the three firms at the date of the *farighkuttees*, and of what has been received and paid in respect thereof, and by whom; and by enquiring whether any and which of the debts due to or from the said firms remain outstanding and unpaid respectively, and by ascertaining what, upon the result of these accounts, is due from either and which of the parties to the other of them. Act VIII of 1859, Section 92, seems to give to the Court the power of appointing a receiver if one should be necessary.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Judicial Commissioner of the 3rd of July 1863, and that of the Civil Court of Lucknow of the 4th of September 1862, and to remit the cause to the Judge, with directions to wind up the outstanding concerns of the three firms pursuant to the *farighkuttees*, unless the parties shall consent to any other mode of determining their rights in these outstandings. Their Lordships think that the appellant is entitled to the costs of this appeal, and also to the costs of the order of the 15th of May 1862, and of the proceedings following upon it.

The 1st February 1866.

Present :

Lord Chelmsford, Sir J. T. Coleridge, Sir. J. W. Colvile, Sir E. V. Williams,
and Sir L. Peel.

**Mortgage—Law of Foreclosure in Bengal—Conditional Sale—Benammee Lease—
Production of Accounts—Mesne—Profits—Plaint (Error in—not to bar
relief really sought)—Remand—Interlocutory order—Appeal.**

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

A. J. Forbes,

versus

Ameroonissa Begum and others.

Exposition of the Law of Foreclosure as established by the Regulations and the practice of the Courts in Bengal.

Plaintiff purchased a property from defendant's late husband under a deed of conditional sale and an *ekrar*. On the day before the date of the Bill of Sale, defendant's husband granted a beneficial lease of the mortgaged premises, benamee to the plaintiff's son, but really to plaintiff who, under color of it, obtained possession of the mortgaged premises. Plaintiff, although in possession of the mortgaged premises, sues for possession and mesne profits.

Held (1) that, as the real object of the suit was to perfect plaintiff's title as absolute owner of the property, he was not debarred from that relief, if he was otherwise entitled to it, because, under an erroneous view of the effect of the lease, he had asked for it by his plaint in a somewhat different form, and with something to which he was not entitled.

(2). That, while the lease did not save the plaintiff from the liabilities, at the same time that it gave him the advantages, of a mortgage in possession, still less could it be taken to modify the terms of the conditional sale.

(3). That it was not necessary, either that the mortgagee's demand should be for a specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in the preli-

minary proceedings in which they could not be investigated, but that the obligation to produce the account depends on the circumstances of the case and the nature of the issues raised.

(4). That the Sudder Court's order, remanding the plaintiff's suit for retrial on the production of the accounts, was an interlocutory one, and that plaintiff's omission to appeal against it did not preclude him from now insisting that the remand for the production of the accounts was erroneous, or that the cause should have been decided in his favor, notwithstanding the non-production of the accounts.

(5). That the production of the accounts was not necessary in a case in which there was no plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

(6). That plaintiff was entitled to possession of the mortgaged premises as absolute owner by virtue of the conditional sale which had been duly made absolute, but not to mesne profits.

On the 13th of March 1850, Shah Ally Reza, the late husband of the present respondent, executed an instrument which, upon the face of it, purported to be an absolute bill of sale of the talook and lands therein described to the appellant, in consideration of the sum of 39,500 rupees. On the same day the appellant executed to Shah Ally Reza an ikrah or agreement, importing that, on payment of the sum of 39,500 rupees, with interest at 12 per centum per annum on the 13th March 1851, the sale should be void; but that in the event of the seller's not paying the principal and interest according to this engagement, the ikrah was to be null and void, and the purchaser (the appellant) was to become the absolute proprietor of the property.

The effect of these two instruments was simply to secure the repayment of the sums lent by the appellant to Shah Ally Reza, with interest on the day named by means of that kind of mortgage which is known in India as *bye-bil-wufa*, or conditional sale.

The transaction between the parties, however, included something more. On the 12th of March, the day before the date of the bill of sale, Shah Ally Reza had granted a lease of the mortgaged premises for three years ostensibly to Mr. Alexander Demetrius Forbes, the son of the appellant, and had taken the corresponding *kuboolut* from him.

The latter, which is at page 45 of the record, shows that the lessee had bound himself, after paying the Government revenue and other charges on the lands, to pay to the lessor, by way of rent for the Bengali year 1258, the sum of 2,000 rupees; for the year 1259, 2,332 rupees 9 annas 6 pie; and for the year 1260, 2,399 rupees 2 annas 6 pie.

And it appears on the face of the ikrah, that Shah Ally Reza had given an order to the lessee to pay by instalments out of this rent to the appellant the sum of 2,101 rupees in part satisfaction of 4,740 rupees, which would become due on the 13th of March 1851, for one year's interest on the 39,500 rupees.

It has been proved as a fact, and is not now disputed, that the grant of this beneficial lease was what is called in India a *benamee* transaction; that, though taken in the name of his son, it was really a lease to the appellant, who, under color of it, obtained possession of the mortgaged premises.

In April 1851, the time fixed for the repayment of the mortgage-money having expired, the appellant commenced the proceedings, which must be taken in order to foreclose a mortgage of this kind, and make the conditional sale absolute.

And the question on the appeal is, whether these proceedings have been effectual, or whether his suit has been properly dismissed by the decree of the Zillah Judge, confirmed by that of the Sudder *Dewanny* Adawlut.

So many points touching the regularity of these proceedings have been raised at the Bar that it is desirable, before going further, to state what, in their Lordships' apprehension, the law of foreclosure, as established by the Regulations and the practice of the Courts in Bengal, is.

Up to the year 1806, the rights of the holder of a *bye-bil-wufa* were enforceable according to the strict terms of the contract. It was necessary for the mortgagee, if he wished to save his estate from forfeiture, to tender the amount due, or to pay it into Court, pursuant to the provisions of Regulation I. of 1798, within the stipulated period for the repayment of the loan.

Regulation XVII of 1806, first introduced a modification of the strict rights given by the contract analogous to, though by no means identical with, that which Courts of Equity have long imposed on mortgagees in this country. The 7th Section of that Regulation extended the period within which the mortgagor might redeem to any time within one year from and after the application of the mortgagee to the Zillah Court under the following Section.

And that Section, being the 8th, provided that a mortgagee, desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent was repaid, should, after demanding payment from the borrower or his representatives, apply for that purpose by a written petition to the Zillah Judge, who should cause the mortgagor to be furnished with a copy of the application, and notify to him that, if he did not redeem the property in the manner provided by the preceding Section within one year from the date of the notification, the mortgage would be finally foreclosed, and the conditional sale made absolute.

Hence, when these proceedings have been had, it becomes incumbent on the mortgagor to take within the year the steps towards redemption which are prescribed by the 7th Section.

Within that period he must either pay or tender (and the proof of such payment or tender will lie on him) the sum lent, or the balance due if any part of the principal has been discharged, and also in the case in which the mortgagee has not been put into possession of the mortgaged property, any interest that may be due; or (and this is the alternative commonly adopted) he must make a deposit pursuant to Section 2 of Regulation I of 1798.

That enactment, of which the object was to relieve mortgagors seeking to redeem, from the difficulties of proving a tender, by enabling them to pay the proper amount into Court, thus prescribes what the deposit is to be:—"When the lender has not obtained possession of the lands, the deposit is to be the principal sum lent with the stipulated interest thereon; but if the lender has held possession of the land, the principal sum borrowed need only be deposited, leaving the interest to be settled on an adjustment of the lender's receipts and disbursements during the period he has been in possession. In either of these cases the deposit preserves to the borrower his full right of redemption, and entitles him to immediate possession of the land, if that is in the possession of the lender, subject to the adjustment of the accounts." A third case is then provided for as follows:—"If the borrower in any case shall deposit a less sum than above required, alleging that the sum deposited is the total sum due to the lender for principal and interest, after deducting the proceeds of the lands in his possession, or otherwise, such deposit shall be received, and notice given to the lender as above directed, and if the amount so deposited be admitted by the lender, or be established on investigation to be the total amount due to him, the right of redemption shall be considered to have been fully preserved to the borrower, who will not, however, in such cases be entitled to the recovery of the lands until it be admitted or established that he has paid the full amount due from him." The 3rd Section prescribes the manner in which the lender is to account in those cases in which an account shall be necessary.

The general effect of these Regulations is, that if anything be due on the mortgage and the mortgagor makes an insufficient deposit, and *a fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July 1813, No. 37, and has ever since been settled law, that the functions of the Judge under Regulation XVII of 1806, Section 8, are purely ministerial, and that a mortgagee, after having done all that this Regulation requires to be done in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession if he is out of possession, or to obtain a declaration of his absolute title if he is in possession.

In that suit the mortgagor may contest on any sufficient grounds the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be whether anything at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit had been then made. If that is found against the mortgagor, the right of redemption is gone.

It has been stated that the appellant commenced his proceedings to foreclose under the Regulation on the 5th of April 1851. On the 31st of August 1852, the Principal Sudder Ameen of the Zillah, in whose Court these proceedings had been had, made an Order which, after stating all that had taken place, including the claims of certain third parties, concluded thus:—"Forasmuch as the term of one year has expired from the date of the issue of notice, and the mortgagor has not deposited the amount of the mortgage, and that the plea of the before-mentioned third parties is not cognizable in this miscellaneous case, therefore considering that Regulation XVII of 1806 has been complied with, it is ordered, that this suit be decided, and that the papers of the case be forwarded to the Judge's Court."

Upon this, on the 28th of January 1853, the appellant commenced this suit in order to complete his title under the foreclosure. Treating, however, the lease to his son as a subsisting lease to that person, and himself as out of possession, he asked to have possession decreed to him, together with mesne profits from the 13th of March 1851, calculated upon the rent reserved by the lease.

The answer of Shah Ally Reza, after raising a question touching the sufficiency of the stamp, which it is not necessary to consider here, alleged by way of defence that the appellant, before filing his petition for foreclosure in the Zillah Court, had not made the demand required by law; and after stating the circumstances under which the lease was granted, insisted that by virtue thereof the appellant had fraudulently held possession of the mortgaged property in his son's name. And in order to show what was the value of this possession, the answer contains a passage which after stating the gross revenue of the various portions of the mortgaged property, amounting in all to 9,601 rupees 7 annas 2 pie, and the charges thereon amounting in all to 3,931 rupees 9 annas 4 pie, proceeds thus:—"There remains 5,666 rupees 13 annas 10 pie as annual profit. Out of this amount, deducting 4,740 rupees as interest due on the principal, the remaining sum of 926 rupees 13 annas 10 pie must have been annually received by the plaintiff on account of the said amount of principal." The answer also insisted that the appellant was bound to render an account in conformity with Sections 10 and 11 of Regulation XV of 1793, and that the bye-bil-wufa had been vitiated by the fact of his having realized the whole of the interest as well as a portion of the principal from the profits of the mortgaged property; and that the appellant was bound to render an account in order that the Court might be satisfied how much was due, and from whom.

The material issues settled by the Judge were:—

1st. Whether the plaintiff had performed the considerations prescribed by Section 8 of Regulation XVII of 1806, and was entitled to possession.

2ndly. Whether plaintiff was or was not in possession.

3rdly. Whether the claim for mesne profits was correct.

4thly. Whether the receipt by plaintiff of interest on the purchase money invalidated the bye-bil-wufas.

The cause was tried by Mr. Loch, the Civil Judge of Purneah, on the 18th December 1854.

The principal point contested on the first issue was whether there had been a sufficient demand, and this issue was found in the plaintiff's favor. On the third and the last issues the Judge found that the lease was, in fact, taken by the plaintiff, who must be taken to have been, under colour of it, in possession of the

mortgaged property : but that inasmuch as it was not attempted to show that the collections realized by the plaintiff covered the principal and interest of the debt, and it was, in fact, admitted that when the notice under Section 8 of Regulation XVII of 1806 was filed, a balance was due and that there was nothing to show that the defendant had paid any part of it, the bye-bil-wufa was not invalidated, and that the plaintiff was then absolutely entitled to the property. On the fourth issue he found, erroneously and inconsistently with his finding on the question of possession, that the claim for mesne profits was correct. The decree was for possession with the mesne profits claimed.

The defendant, Shah Ally Raza, appealed to the Sudder Dewanny Adawlut. That Court by its order, dated the 22nd of January 1857, held that the Judge had been wrong in decreeing Wassilât, or mesne profits ; and further, that as the appellant had been found to have been in possession, he was bound, before he was entitled to have his conditional sale made absolute, to render accounts and to show that the loan had not been liquidated with interest from the usufruct of the property, and it remanded the case, in order that the Judge might call upon the plaintiff for his accounts, and then, with reference to the above remarks, decide the case according to the results shown by them.

The case went back, the plaintiff produced accounts, in which he charged himself, not with the gross collections, but with the rents reserved by the lease. The then Acting Judge (Mr. Brodhurst) held that these accounts were insufficient, and that the proper accounts not having been produced, he was precluded from deciding as to the balance due to the plaintiff, and accordingly by his decree, dated the 29th of March 1859, dismissed the suit.

Against this decree the appellant appealed to the Sudder Dewanny Adawlut, but that Court by its order of the 21st of April 1862, dismissed the appeal with costs ; refusing to remand the cause again, in order to give the appellant an opportunity of producing the proper accounts.

He afterwards applied for a review of judgment on affidavits directed to show that he had tendered the proper accounts in the Court below, but this application was also rejected with costs, on the 21st of January 1863.

The present appeal is from the decrees dismissing the suit.

The learned Counsel for the respondent in the course of their able argument maintained the propriety of this dismissal upon various grounds, of which some do and some do not directly arise upon the decrees now under appeal. And it seems convenient to consider the latter in the first instance.

Mr. Rolt insisted that inasmuch as it had been conclusively found that the appellant was in possession of the mortgaged premises, and the plaint was, nevertheless, for possession and mesne profits ; the form of the suit was of itself a sufficient ground for its dismissal. Such, however, was not the view taken in the Courts below. If it be granted that this point is raised, and it is not very clearly raised by the answer, it does not appear to have been among the grounds of the respondent's appeal from Mr. Loch's decree ; which, though not set out *in extenso* in the record, are noticed by the Sudder Court in its judgment of the 22nd of January 1857. The objection, if made, was certainly not treated as a valid one by the Sudder Court ; which did not dismiss the suit, but remanded it for re-trial on the production of the account. That remand implied that the appellant might succeed. The real object of the suit is to perfect his title as absolute owner of the property ; and their Lordships do not see why he should not have that relief, if he be otherwise entitled to it, because, under an erroneous view of the lease, he has asked for it by his plaint in a somewhat different form, and with something to which he is not entitled.

It was also urged that the bye-bil-wufa, the ikrar, the lease, and the kuboulent must be taken together as one transaction ; that the effect of the two latter so qualified that of the two former that the mortgage must be taken to have been in

its inception one for the term of three years, and that until the expiration of the term the appellant was not at liberty to take any step towards foreclosure. Their Lordships have to observe that this was not one of the issues in the cause, and that the point is not even raised on the pleadings, nor do they think that this defence could have been successfully raised. The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it. That transaction has been held, and properly held, not to effect that for which it was probably designed, *viz.*, to save the appellant from the liabilities, whilst it gave him the advantages of a mortgagee in possession. Still less can it be taken to do what it was never meant to do, *viz.*, modify the terms of the conditional sale.*

It was further urged that the proceedings in the Sudder Ameen's Court under Section 8 of Regulation XVII of 1806 were irregular, both by reason of the insufficiency of the demand, and the non-production of the accounts in the course of those proceedings. One of the issues in the cause, when it was before Mr. Loch, was whether the plaintiff had performed the conditions prescribed by the Regulations, and that issue was found in his favor. As far as appears from the printed record, the respondent did not appeal from that finding. He had undoubtedly raised in the Zillah Court the question whether there had been a sufficient demand, and the fact had been found against him. He had not taken the point that the accounts ought to have been produced in the preliminary proceedings. Their Lordships are disposed to think that upon the true construction of the Regulations, and of the Circular Order, it is not necessary either that the demand should be for the specific sum ultimately ascertained to be due, or that the accounts of a mortgagee in possession should be produced in these preliminary proceedings, in which they cannot be investigated.

The questions which really arise upon the decrees under appeal, and on which the determination of this appeal depends, are these:—

1st. Whether the Sudder Court was right in requiring the appellant to produce his accounts, and in remanding the cause for re-trial on the production of those accounts by its order of the 22nd of January 1857.

2ndly. Whether, if it were wrong in so remanding the cause, the appellant is not now bound by that decree, against which he did not appeal.

3rdly. Whether the Zillah Judge and the Sudder Court were right in dismissing the suit, because the appellant had not produced the proper accounts, or whether they ought to have given him further time for so doing.

Their Lordships, considering the first question independently of the authority of decided cases, are of opinion that, upon the true construction of these Regulations, there was no necessity for calling for the production of the accounts, and, consequently, that the order for the remand was wrong. The issue upon which the determination of the cause depended, and upon which even by the order of remand it was made to depend, was whether the loan had been liquidated, with interest, from the usufruct of the property. Now, not only was there no allegation on the pleadings, or issue raised in the cause, to the effect that the loan had been thus liquidated, but there was an express admission on the face of the defendant's answer that even on his mode of stating the account, the principal sum of 39,500 rupees had, when the foreclosure proceedings were commenced, and when he ought to have made the requisite deposit, been reduced by no more than 927 rupees. It was therefore clear, upon the face of the proceedings, that the question to be tried could be answered only in one way, and that in favor of the appellant. And the order of remand can be supported only on the principle that, in all cases, it is imperative upon a mortgagee who has been in possession to produce his accounts. For this position their Lordships can find no grounds in the Regulations. The words of the 3rd Section of Regulation I of 1798, from which (if at all) an inflexible obligation to produce the accounts must be inferred, are,—“In all instances wherein the lender on a *bye-bil-wufa* may have been put in possession of the land, and an *adjustment*

of accounts may consequently become necessary between him and the borrower, the lender is to account," &c. Two conditions are expressed, the possession of the mortgagee, and the necessity of an account. And a comparison of this with the preceding Section, and with Regulation XVII of 1806, shows that that necessity arises, and need only arise, *first*, when the mortgagor has deposited the principal, leaving the question of interest to be settled on an adjustment of the account; *2ndly*, when he has deposited all that he admits or alleges to be due; *3rdly*, when he pleads, and undertakes to prove, that the whole of the principal and interest has been liquidated by the usufruct of the property.

It remains to be seen whether the proposition that the mortgagee, who has been in possession, must in all cases produce his accounts, has been conclusively established by the authority of decided cases.

The cases cited by the Sudder Court in its judgment, and now relied on by the respondent, are reported in the decisions of the Sudder Dewanny Adawlut of Bengal for 1852, pp. 678 and 1063. The transactions out of which these cases arose were not mortgages by way of conditional sale, but mortgages of a different character, and governed by different rules. Neither authority, therefore, seems to touch the point now under consideration. On the other hand, in a more recent case, which is reported amongst the decisions of the same Court for 1859, at p. 492, the Court held that there being no averment in the answers that the plaintiff had paid himself by the usufruct of the property, the objection that the mortgagee had not produced his accounts could not be entertained on the appeal.

The question, therefore, cannot be said to have been concluded against the appellant by authority; and their Lordships have already intimated their opinion, that upon principle the obligation to produce the accounts should depend on the circumstances of the case and the nature of the issues raised.

Upon the question whether the appellant is so bound by the order of the 22nd of January 1857, against which he did not appeal, that he cannot impeach the correctness of the remand, their Lordships have to observe that the order was an interlocutory one; that it did not purport to dispose of the cause; and consequently, that upon the principle laid down by this Committee in the case of Maharajah Moheshur Sing *vs.* the Bengal Government (7 Moore's Indian Appeals, p. 283), upon which their Lordships have very recently acted in a case from Oude, the appellant is not now precluded from insisting that the remand for the production of the accounts was erroneous; or that the cause should have been decided in his favor, notwithstanding the non-production of the accounts. In truth, the learned Judges of the Sudder Court, by their judgment of the 21st of April 1862, (App. p. 82, line 30) treated the latter point as still open to the appellant, although, upon grounds which appear to their Lordships to be unsatisfactory, they determined it against him.

The view which their Lordships have taken of the questions already considered renders it unnecessary to determine whether the appellant ought to have been allowed further time, or a second opportunity for the production of the accounts required from him. Their Lordships will only say upon this point that the affidavits filed by him on the application for a review are, when contrasted with his grounds of appeal at page 77 of the record, extremely unsatisfactory, and that he appears to have done little to entitle him to the indulgence of the Court.

They are therefore not prepared to say that if the production of the accounts required had been necessary, those delivered were sufficient; or that in that case there would have been any such improper exercise of the discretion of the Court below as their Lordships would have interfered with. But they think that the error of the Court below was in the dismissal of the suit, on the assumption that the production of any accounts was necessary in a case in which there was neither plea nor proof that the usufruct had liquidated principal and interest, and no deposit had been made to cover the balance admitted to be due.

Their Lordships, on the whole case, are of opinion that this appeal should be allowed, and they will humbly recommend Her Majesty to reverse the decrees appealed against, and also the order of remand of the 22nd of January 1857, and to vary the decree of the 18th of December 1857, by declaring that the appellant was entitled to the possession of the mortgage premises as absolute owner, by virtue of the conditional sale which had been duly made absolute, but was not entitled to a decree for any mesne profits. Their Lordships think that the appellant is entitled to the costs of this appeal, and also to all costs of the suit below, up to and including the costs of the order of the 22nd of January 1857.

Considering that he might have appealed against that order, and that his conduct in the subsequent proceedings in the Court below has not been satisfactory, their Lordships are not disposed to recommend that he should have the costs of those proceedings against the opposite party. He will of course be entitled to a refund of the costs (if any) which have been paid by him under any of the decrees reversed.

The 10th February 1866.

Present :

Lord Chelmsford, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Multifariousness—Misjoinder of causes of action—Suit for possession and rent and confirmation of title—Birt—Evidence.

On Appeal from the Sudder Dewanny Adawlut of Calcutta.

Maharajah Rajendur Kishwar Sing,

versus

Sheopurshun Missur.

A suit by a Zemindar for possession of lands and for arrears of rent of those lands under a kubooleut given by the defendant, and to set aside a summary award of a Deputy Collector and to have it declared that a *Bhakee Birt* tenure set up by the defendant is a fabrication and void, is not multifarious, or bad on the ground of misjoinder of causes of action. In such a case all the distinct portions of the plaintiff's claim flow from, support, and have a relation to and connexion with his proprietary title which he seeks to confirm, and which *prima facie* entitles him to the collections.

The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleadings, and tardy production of important portions of a claim or defence, be viewed in connexion with the oral or documentary proof which *per se* might suffice to establish it.

THIS is an appeal from a decision of the late Sudder Dewanny Adawlut of Bengal, which reversed a decision of the Zillah Court in favor of the appellant, the plaintiff in the suit. The decision of the Sudder Court proceeded solely on the ground of misjoinder of causes of action in the plaintiff's suit. That objection had been raised in and overruled by the Court below. It is necessary for the due consideration of this objection to ascertain carefully what are the causes of action which are stated in the plaint. The plaint states them with sufficient precision in the first paragraph. It alleges that the plaintiff sues, not summarily, but in due form, for possession of certain mouzahs which it describes by names and boundaries, and which it alleges to be his hereditary property; and also to recover certain arrears of rent, amounting to 1,030 rupees 9½ annas for 1260 Fuslee, for which a summary suit was pending; and 2,305 rupees 13 annas 2 pice, the rent for 1261 Fuslee inserted in the kubooleut, dated 5th of the month of Assin 1258 Fuslee, by the annulment of a summary award of the Deputy Collector of the district of Chumparun, dated 29th May 1854, and by the cancellation of a letter affirming the *Bhakee Birt* tenure, dated 17th of the month of Assin 1232. This specification of the causes of suit is accompanied with statements of the falseness of the claim to the *Birt* tenure, of the danger which the plaintiff apprehends to his proprietary title from the summary decision above mentioned, that its annulment is impossible without a regular suit, and

he concludes the paragraph by stating that he sues, therefore, for the reversal of the summary award, the confirmation of his proprietary interest and possession, and the refutation of the allegations of the defendant respecting the Bhakee Birt.

The case, then, as alleged in the plaint, if the plaint be regular, must be brought within the principles stated in Mr. Macpherson's book on Civil Procedure, page 111, third edition, where he says,—“a plaint may have an appearance of doubleness when it prays not only for possession, but that the transactions upon which the defendants are supposed to found their title may be set aside; but the latter prayer is merely subsidiary to, and in fact forms part of, the former, because possession cannot be given without first removing the existing impediments.” This question is distinct from any that relates merely to defect of proof or error in law, in a plaintiff's view of his case in the whole or part. That may warrant a dismissal at the hearing wholly or in part. The question here relates to unity of title, and connection and dependence between the claims of the plaintiff. In this suit the plaintiff's title is one; it is his proprietary right as zemindar. We must look to the plaintiff's admitted title as zemindar and to the interference with such title by an established tenure of this kind, to learn what is meant by the term “possession.” The mouzahs are part of the plaintiff's zemindary; the plaintiff is the assessed proprietor under the Decennial Settlement. The dependent claims that which would, if established, be a dependent tenure, the zemindar being his immediate superior in the holding. It is not a ryotwary tenure at all, and no question as to ryot's titles to occupancy can arise in this dispute. All the distinct portions of the plaintiff's claim flow from, support, and have relation to, and connexion with, his proprietary title, which *primâ facie* entitles him to the collections. The farming lease supports it, the rent payable under that lease supports it, and the removal of the adverse title would confirm it.

If this tenure be not interposed between the zemindar and the cultivators, the ordinary relation between him and them exists; but if it be interposed, the zemindar's general proprietary title to the collections is gone, and in lieu of it he is simply entitled to some jumma from the mesne proprietors. It is obvious, then, that the assertion of such a title is a serious prejudice to a zemindar, and may materially interfere with his successful management of his zemindary. Such an intermediate tenure cuts off the possession, that is, the zemindar's title to the rents and profits immediately derived from the cultivators. In this sense, the term possession is used in this plaint. Now this injury, supposing the claim to the Birt tenure to be groundless, is not the less a wrong requiring a remedy, when it is put forward by one in possession under a title to an inferior right derived from the zemindar; as, for instance, by a farmer of a portion of the zemindary. If such a claim were preferred by a person having such an interest, it would certainly be competent to the zemindar, if the claim amounted to a repudiation or worked a forfeiture of the existing interest, to sue for the restoration of possession and the quieting of the claim also; because the limitation of his demand to that of possession would keep alive an adverse claim, and would also multiply suits.

A zemindar or landlord may waive a forfeiture, and may treat a tenancy or interest as continuing, which his tenant repudiates, or in respect of which he has incurred a forfeiture. Consequently, the mere inclusion of a claim for rent in a suit of this character cannot make the suit multifarious, unless it could be treated as multifarious if it insisted on the repudiation or forfeiture.

If the Birt tenure be valid, the plaintiff has no title to possession in the sense in which he uses that term. He might have a right to rent for a time on the footing of contract, or estoppel, even from a Birt tenant, if the latter accepted a lease; but that would rest on special grounds, and would not flow from his general proprietary title. Until this claim to a Birt tenure, therefore, be removed, the plaintiff cannot have the “possession” which he seeks, since, in some way or other, the defendant stands between the plaintiff, as owner of the *primâ facie* proprietary

right and the cultivators. Had the defendant admitted the tenancy under the kubooleut, the plaintiff's title to the rent would have been established; but that admission, unless qualified, would also have removed those impediments to the plaintiff's proprietary title which he desires to have removed; but as the defendant repudiates that tenancy altogether, he, at least, when the plaintiff fails to prove it, cannot urge it against the plaintiff's title. See in the case of *Rajah Oodit Purkash Singh against Martindell and another* (4, Moore's Indian Appeals, p. 444), Lord Kingsdown's judgment in affirmance of the general principle.

This lease being removed (the plaintiff having failed to prove it, and the defendant renouncing it), what bar is there to the assertion of the proprietary right to the collections, unless the Birt tenure interpose one? On that bar the defendant does rely, and unless it be removed, the plaintiff can scarcely expect to lease or otherwise manage his zemindary with effect. It is an impediment in the way of his possession, which the suit is instituted to remove. The reasons alleged in the *Sudder Ameen's Court*, for overruling the objection, seem to be unsatisfactory; for as the title to mesne profits supposes a wrong, and the title to rent proceeds on contract, the union of such causes of action would be contrary to principle. But as these Courts have the divided jurisdiction of a Court of Law and a Court of Equity, substantially united in one Court, a claim for rent in arrear, and a claim to remove clouds on the title to demise raised by the tenant, seem to be unobjectionable, and no authority was cited to support the objection. In truth the claim to rent under the farming lease supports the proprietary title.

No inconvenience can result from the inclusion of these subjects in one suit, since the defence to the claim for rent in fact raised them all, and they were dealt with without confusion or difficulty.

Their Lordships think, therefore, that the *Sudder Court* should have heard the appeal upon the merits. Their Lordships ought, upon general principles, to give now the decision which the *Sudder Court* should have given; but a difficulty has been interposed in the Court of the *Sudder Ameen*, which renders a decision on the Birt tenure impossible by this Board. The question of this Birt tenure has not been adjudicated upon in the Court below. The *Sudder Ameen* should have allowed the defendant to get his documents stamped, and, if necessary, should have adjourned the hearing for that purpose. The Court, however, excluded them from evidence, as unstamped, and as documents which were inadmissible unless stamped. The plaintiff ought not in any way to be prejudiced by this neglect of the defendant, and to allow the defendant to re-agitate these questions as to the Birt tenure in another suit would be a serious injustice and wrong to the plaintiff. The proper course, then, to be adopted is to reverse the decisions of the *Sudder Court* and of the *Sudder Ameen*, and to remand the cause to the Lower Court, not for the purpose of taking further evidence, or of hearing the cause on fresh materials other than the stamped documents, but to enable the defendant to get the instruments stamped. The Inferior Court should then decide on the evidence already taken in the cause, and on those documents, if stamped, with reference to all the issues raised on the cause, giving a complete decision on them all. Their Lordships will forbear from expressing any opinion upon the validity of the Birt tenures, on the evidence in its present imperfect state; but they think it proper to observe that, if the Birt tenure be displaced, that displacement will tend considerably to fortify the plaintiff's proof of the kubooleut; for the defendant's possession would then have no apparent title, unless one derived from a lease from the zemindar, the sole proprietor; no person (on that hypothesis) intervening between the cultivators and the proprietary title of the zemindar.

This order, for remanding the cause to be thus re-heard, will entitle the plaintiff to have the matter of his appeal to the *Sudder* on the kubooleut re-opened. It is in favor of his appeal so far as to subject the decision against the kubooleut to review upon the re-consideration of the whole case upon the merits. The consideration

of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim arising on all the evidence offered, or on proofs withheld, on the course of pleading, and tardy production of important portions of a claim or defence, be viewed in connexion with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted.

Their Lordships will recommend to Her Majesty that the decrees of the Sudder Court and of the Sudder Ameen be reversed; that the appellant should have the costs of the appeal; that the cause be remanded to the High Court, with directions to send the cause back to the Zillah Court for re-trial on the issue of the existence of the Birt tenure, giving the respondent an opportunity of having the unstamped documents stamped if he shall be so advised, but making him liable for the costs of the first trial, which his omission to have those documents stamped has made abortive.

The 26th February 1866.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Remand for trial on proper issues on the merits—Duty of Lower Courts to pronounce their opinion on all important points—Estoppel (unsuccessful application to intervene)—Costs of Appeal to Privy Council—Inclusion of unnecessary documents in printed transcripts sent from India.

On Appeal from the Sudder Dewanny Adawlut of Bengal.

Tarakant Bannerjee,

versus

Puddomoney Dossee and others.

Case remanded for trial on the proper issues on the merits, the merits not having been entered into in the Courts below so as to enable the Privy Council to dispose of the suit. In appealable cases, the Courts below should, as far as may be practicable, pronounce their opinions on all the important points; whereas by forbearing from deciding on all the issues joined, they not unfrequently obliged the Privy Council to remand a case which might otherwise be finally decided on appeal.

A party whose application to intervene in a suit has been refused, is not bound by the decree in that suit.

In taxing the costs of an Appeal from India, the Privy Council will disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from India of matters which have been improperly introduced therein.

The attention of the Courts in India drawn to the frequent inclusion of voluminous papers, accounts, and receipts, in the transcripts printed in India and sent over in that form to the Privy Council.

THIS is an appeal from a decree of the late Sudder Dewanny Adawlut of Bengal, affirming a decision of the Zillah Court at Dacca, which dismissed the plaintiff's suit. The suit of the plaintiff was instituted on the 28th day of August 1856. It was brought to recover 1,384 beegahs 14 cottahs of land, described as jote, set out by fixed boundaries, and situate in certain mouzahs or kismuts called respectively Narainpore, Khoondkarkandee, Goonerkandee, and Kuddumpoor; and also to reverse a summary order of the Sudder Dewanny Adawlut, bearing date 18th November 1845, and made in a miscellaneous or summary suit in that Court. The Zillah Court dismissed this suit of the plaintiff on two grounds,—*first*, that it was barred by the Law of Limitation, and *secondly*, that the matter had been decided adversely to the plaintiff's claim in a former suit, by which the Court adjudged him to be bound. The Sudder Court, on appeal by the present appellant, decided the case against him on the Law of Limitation only, and expressed no opinion on any other point. The decision of the Sudder Court on the Law of Limitation, proceeded on a different ground from that on which the Lower Court had founded its decree,

dating possession under the adverse title from a time later than that which the Zillah Court had fixed for its commencement. The appellant reckoned the time of his dispossession from the 18th November 1845, the date of the decree for the reversal of which his suit is brought. If he is right in this view of the subject, his suit was brought in time. The Sudder Court carried the adverse possession back to an earlier order of the Court, bearing date the 11th April 1844, and counting the time of adverse possession from that last date, it held the suit to be barred by effluxion of time. The Zillah Court, in their judgment, had carried the time still further back to the year 1841, considering that the plaintiff's dispossession was effected by possession, having, as the Court considered, been at that time delivered to the plaintiff in another suit, to which we shall presently refer, by one Ramgottee Rae, the Ameen delegated by the Court to execute the decree in that suit. The case is somewhat complicated by reason of the long continuance of litigation between different parties, and the conflict of claims in two different concurrent suits. It is necessary therefore to state the nature of this litigation and the titles of the appellant and of the principal original respondent Rasmoney Dossee, in order to clear the subject of possession from some confusion in which it has become involved.

The jote tenure is a dependent tenure within and part of a zemindary called Pergunnah Taleehate Ameerabad. In the month of February in the year 1814, a litigation commenced between the zemindar and three persons named Reazooddeen Mahomed, Fyzooddeen Mahomed, and Mahomed Cossim, termed the moonshees (a description which for the sake of brevity it will be convenient to adopt). The moonshees complained that they had been dispossessed by the zemindar of their jote tenure, including the lands claimed in this suit; the zemindar denied that inclusion, and claimed them as part of his zemindary. At this time, the moonshees were possessed of a talook called Ooturnarainpore, paying revenue direct to Government; and throughout their litigation with the zemindar, during their claim to the one property and concurrent possession of the other, they insisted that these lands were included in their jote tenure, and made no claim to them as included in the talook; proof of this inclusion in the talook would have been a complete answer to the claim of the zemindar, and would have freed them from dependence on his title and the risks attendant on a subordinate tenure.

The moonshees succeeded in that litigation, and the decree in their suit declared the lands to be part of the jote tenure, and limited the zemindar's claim to a title to assess them for rent. The zemindar appealed against this decree, which was however affirmed, and Byrubchunder Bannerjee, an Ameen, was ordered to give possession of the lands to the moonshees. This was done in conformity to the decree, and possession was given in the usual way by the Ameen, by taking kuboolcuts from the cultivators, and by fixing bamboos to mark the boundaries. The Ameen's report to this effect was in evidence before the Court. There is no evidence of any subsequent disclaimer on the part of the moonshees, of this tenure so pleaded, proved, and adjudged, nor of any attempt to withdraw any part of the lands from the jote tenure, on the ground of mistake or otherwise, and to ascribe them to the talook title before the time of the judicial sale which is now about to be stated. The rent of the jote tenure fell into arrear, the zemindar sued the moonshees for rent, recovered in the suit, and caused the jote tenure to be sold in satisfaction of the debt due under this decree. This sale took place on the 10th June in the year 1836, and one Juggutchunder Rae was the purchaser. The appellant's title is derived from him under two intervening private sales, one by Juggutchunder to one Ramdhone Sircar, and the other by the sons and heirs of Ramdhone to the appellant. By this purchase, Juggutchunder obtained the right, title, and interest of the moonshees in the jote tenure. He became, by force of this purchase, in the same relation to the zemindar in which the moonshees before stood. As against the moonshees themselves and the zemindar, the title of the purchaser was that which the moonshees had had adjudged to them in their suit against the zemindar. The possession given to

the purchaser was co-extensive with that given to the moonshees, and it was in strict conformity to the law which obtains in those Courts. The tenants were properly directed to attorn, and properly attorned to that title. It is important to keep this origin of the possession clearly in view.

The moonshees appear to have disputed, at that time, the title of the auction-purchaser to have these lands included in his purchase; they claimed them then as included in their talook. It is the practice of those Courts, and it is one perfectly consistent with reason and justice, not to give possession under a judicial sale by removing the possession of one who is in possession under an apparent *bonâ fide* title. If the debtor can assert his title to possession by suit only, the new owner of his title can have no higher claim. The Court therefore leaves the purchaser to assert his title by regular suit. In this case, however, the moonshees, the debtors under the decree, were themselves in possession. The decree was for rent of the jote tenure; the zemindar caused the tenure, including these lands, to be put up to sale; the moonshees, in claiming these lands, had pleaded this tenure, and it was adjudged in their favor by a suit which bound both them and the zemindar. The suit for rent was against them as jote tenants, for rent due under that very tenure, and the demand included the rent of these land; consequently, the Court which directed the execution of the decree was perfectly justified in acting on their own pleaded and by them admitted title, and by putting the decree purchaser in possession. This was done in the regular mode, by taking kubooleuts, except as to one small part, as to which however possession was also given, and the purchaser was thus put in complete possession of these lands under the jote tenure. This appears from the report of the Ameen, pp. 105-109 of the Record. Unless this possession was changed at some intermediate period between the 5th August 1839, the date of the delivery of the possession above stated, and the 18th November 1845, the date of the order of the Sudder Court which is sought to be reversed, the objection that the suit is barred by limitation of time is groundless. If that possession was displaced, in fact, it would be unimportant whether the disturbance took place in a suit to which the purchaser was a stranger, or in one to which he was a party, the possession being alike adverse on either supposition. In considering this question, it is not necessary to state minutely all the intermediate steps before the delivery of possession by the Ameen Ramgottee, on which the Zillah Court relied. That Ameen was acting in the execution of a decree in another suit which had been pending between the moonshees and their mortgagee of their talook. A dispute had arisen between them of this nature: the mortgagor had mortgaged the talook, but, as he contended, excepting these lands from it, as to which he was carrying on a litigation with the purchaser of the jote tenure. The mortgagee, on the other hand, insisted that these lands were included in the mortgage. The suit was decided in favor of the mortgagee, and, as between him and the moonshees, these disputed lands were adjudged to be within the talook; but as the jote tenant was not a party to that suit, the decision in it did not bind him. The mortgagee obtained execution of that decree, and it was under this proceeding the Zillah Court considered that the appellant was dispossessed and the possession given to the mortgagee in the year 1841. The proceedings and the decree, however, are not in evidence in this cause. In the execution of that decree a conflict arose between the purchaser of the jote tenure and mortgagee as decree-holder, each party claiming the same lands, but the jote tenant being in possession.

If this title of the mortgagee could be successfully asserted against the purchaser of the jote tenure, it could be asserted legally in no other mode than by a regular suit instituted for that purpose, for such a possession as that of the jote tenant could not be changed merely in proceedings to execute a decree. This appears to have been entirely overlooked, both by the Ameen Ramgottee and by the Zillah Court in the consideration of his acts. It appears that Ramgottee did, in effect, attempt to disturb the possession of the jote tenant, and that he took fresh kubooleuts

from the cultivators who had before attorned to the jote tenant under the direction of the Court. The Court, however, on the complaint of the jote tenant, set that matter right, and directed in substance the cancellation of the new kubooleuts. The legal effect of this order of the Court was, to set up the original kubooleuts, and to restore or confirm the jote tenant's possession. Now there is not only no evidence of any subsequent change of possession before the decree of the Sudder Court of the 18th of November 1845, pronounced by Mr. Reid, but the very language of that judgment conflicts with such a supposition, for by that judgment, which was adverse to the jote tenant, the possession was ordered to be restored by him to the talookdars. It is plain that there is no error in the language of the judgment; it is language perfectly consistent with the order of the Court directing the second set of kubooleuts to be brought in, and it is also consistent with the course of practice in executing decrees. It is plain, therefore, that both Courts have fallen into error on the point of possession, and that the appellant is perfectly correct in maintaining that he was dispossessed only by virtue of the decision which he seeks to reverse. The act of the Court which directs the cultivators to attorn, is of course not designed to expose them to risk of forfeiture; their simple obedience to the act of the Court, in pursuance of the mode in which it executes a decree, could not be attended with that consequence; and when the Court corrected its error, it meant to restore, and did in law restore, the old possession. As their Lordships think that the possession was not in fact disturbed until within the period of twelve years from the institution of this suit, it becomes unnecessary to consider whether the claim would have been kept alive through the whole time by the litigation as to the execution of the decree.

The other point on which the Zillah Court decided against the appellant was that the matter was already adjudged in a suit by which he was bound. It has been stated that the original purchaser, at the auction sale of the jote tenure, sold to one Ramdhone Sircar. Before this sale, he had instituted proceedings against the decree-holders under the title of the talook. Ramdhone Sircar purchased, therefore, *pendente lite*. He applied to be substituted in the suit, in lieu of Juggutchunder, which application was granted. This litigation terminated in the Zillah Court in favor of Ramdhone, the jote tenant. From that decision Rasmoney Dossee appealed. On her appeal the Sudder reversed the decision. This was the decree of Mr. Reid of the 18th of November 1845, which this suit seeks to set aside.

On this, Ramdhone Sircar instituted a regular suit against Rasmoney Dossee and others, claiming in substance the same relief which is sought by this suit. Pending that suit Ramdhone died, and his three sons, Mohemachunder Sircar, Anundchunder Sircar, and Greeschunder Sircar, were substituted in his place on the record. Pending this litigation, the present appellant purchased the jote tenure from the sons of Ramdhone. He applied in his turn to be substituted on the record and to conduct the suit. One of the sons, however, denied the purchase, and the Court refused the application. In a few days afterwards, the cause was decreed for the defendants. It is alleged that the actual plaintiff conducted their case negligently, if not collusively. On the argument before their Lordships the Attorney-General abandoned the case of fraud, but contended that the plaintiff was not barred by this decision; that he was not a party to the suit; and that his application to intervene in it having been refused, it would be unjust and inconsistent to hold him bound by the decree; that the decision followed so promptly on the refusal to allow him to intervene, that he could not reasonably be expected in the interval either to appeal against the order, refusing him leave to intervene or to institute a suit as supplemental to the one in which he sought to intervene. Their Lordships concur in this view of the subject. As the law allows a party interested to intervene in the suit, that right should not be rigorously dealt with. There is much danger in India of secret collusion. Their Lordships think that the defendants who obtained their decree so shortly after the above refusal, in the absence of

the party really interested in contesting the matter with them, should not be permitted to prevail by this objection.

The cause has not been decided in either Court on the principal point—whether, the lands formed part of the jote tenure or of the talook. Their Lordships are unfortunately unable to decide this appeal finally by reason of this defect. The Courts below, in appealable cases, by forbearing from deciding on all the issues joined, not unfrequently oblige this Committee to recommend that a cause be remanded which might otherwise be finally decided on appeal. This is certainly a serious evil to the parties litigant as it may involve the expense of a second appeal as well as that of another hearing below. It is much to be desired, therefore, that in appealable cases the Courts below should, as far as may be practicable, pronounce their opinions on all the important points. In the present case, the merits not having been entered into in the Courts below, their Lordships find themselves unable to dispose of the suit; and as they do not agree in the opinion either of the Sudder or of the Zillah Court, they will humbly recommend to Her Majesty that the decisions of both Courts should be reversed, and that the High Court at Calcutta should remand the cause for hearing in the Zillah Court on issues on the merits other than the issues already decided in this Court on appeal. Their Lordships will further recommend that the costs of the appeal be paid to the appellant, and that it be referred to the Registrar of this Court to tax the costs of the appeal, with directions to disallow all such costs and expenses as may have been unnecessarily occasioned by the inclusion in the transcript sent from India of matters which he shall consider to have been improperly introduced therein, and that any taxation which may be had in India be regulated by the course which the Registrar of this Court may adopt.

Their Lordships have observed with regret the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in India and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase; and their Lordships trust that the attention of the Court in India from which appeals lie to Her Majesty, will be directed to the subject with a view to provide a remedy for a very serious evil.

The 17th March 1866.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. Colvile, Sir E. V. Williams, and Sir L. Peel.

**Mortgage—Sale for arrears of Government Revenue—Section 24 Act I of 1845—
Fraud of mortgagee—Redemption—Pleading.**

Nawab Sidhee Nazir Ali Khan,

versus

Ojoodhyaram Khan.

The effect of a Foreclosure Decree in the Supreme Court in a mortgage suit between Hindoos, is equivalent to a decree establishing proprietary right, in the Mofussil Courts, on similar suits on the like instruments.

The mortgagee in possession and another having sought to deprive the mortgagor of his title to redeem by means of a secret purchase of the mortgaged estate between them including the fraudulent device of a sale by auction for arrears of Revenue, such arrears being designedly incurred by the mortgagee in possession, it was held that a suit for redemption and for possession instituted many years after the sale for arrears was not barred by Section 24 of Act I of 1845.

If a mortgagee in possession fraudulently allows the Government Revenue to fall into arrears with a view to the land being put up to sale and his buying it in for himself, and he does in fact become the purchaser of it at the Government sale for arrears, such a purchase will not defeat the equity of redemption.

The mere pendency of a suit in the Supreme Court does not operate as a bar to the prosecution of a suit in a Zillah Court intended to be simply in furtherance of, and supplemental to, the suit in the Supreme Court.

Where a plaintiff on certain alleged facts seeks relief and is unable to obtain a trial of the facts by reason of certain conclusions of law which the Judge forms on the case in its then condition, the Courts are bound to proceed upon the facts as they are stated by the plaintiff and upon the assumption of the truth of those facts.

THIS is an appeal from two decrees of the High Court of Judicature at Fort William in Bengal, bearing date respectively the 1st January 1863, and the 12th January 1864, made by Mr. Justice Bayley and Mr. Justice Campbell in a Divisional Branch of the Court. The last of these decrees, which was made on a review of the former, affirmed it with some slight variation which it is unnecessary to specify. The first decree reversed a decision of the Court of first instance, the Zillah Court of Midnapore, made in a suit in which the present respondent was the sole plaintiff. It was a suit for redemption and possession brought by him as mortgagor against the defendants, who were, *1stly*, the representatives of the original mortgagees deceased, *viz.*, Aushootosh Deb and Fromothonauth Deb respectively; *2ndly*, a receiver of the estate of Promothonauth Deb; *3rdly*, the executors of one John Compton Abbott, deceased; *4thly*, one Alexander M'Arthur; *5thly*, the Nawab Nazim; *6thly*, the executrix of a deceased Mahomedan servant of the Nawab Nazim; and *lastly*, the appellant. The connection of these parties respectively with the redemption suit of the plaintiff will be more particularly explained hereafter.

The decision of the Judge of the Zillah Court dismissed the suit of the plaintiff, the now respondent, with costs, on certain objections on points of law which will be subsequently stated, and which, in the opinion of the Judge of that Court, interposed a bar to the further prosecution of the suit. The plaintiff was not permitted to go into proof of his case on the merits. From this decision the plaintiff appealed to the High Court; and that Court, differing in opinion from the Court below on the legal points on which it had proceeded, reversed the decision, and remanded the cause for trial. The present appeal is brought from that decision.

The suit in the Zillah Court was brought for redemption and possession consequent on redemption of certain valuable estates, particularly described in the plaint, constituting the plaintiff's ancestral zemindary. The title asserted was that of a mortgagor seeking to redeem against mortgagees represented by their representatives in estate, and against subsequent alienees of the zemindary taking subsequently to the mortgagees, and, as the plaintiff contended, taking derivatively from them, and subject to his title to redeem them.

One of the points which was urged upon the argument, and which will be considered hereafter in its order, is whether the plaint sufficiently connects the present appellant, whom it states to be in possession of the property, with that mortgage title originally in the Debs, the mortgagees, so as to show *aprimo facie* case for including him in this redemption suit.

The suit was stated by the respondent's Counsel to be supplemental, in its nature and objects, to one in the Supreme Court for redemption of the same property, brought by the same plaintiff against the Debs originally, and by amendment against John Compton Abbott. It was further stated by the respondent's Counsel on this appeal, that, as some of the defendants against whom relief was asked in this suit, *viz.*, the parties above enumerated after Alexander M'Arthur, were not subject to the jurisdiction of the Supreme Court, the plaintiff had sued in the Zillah Court of Midnapore by reason of that defect alone.

The plaintiff, as the eldest son, was the head of a Hindoo family of distinction. A litigation had arisen between him and other members of his family to provide funds, for which he had become a borrower from the Debs. Their advances were secured by mortgages taken at different times, one of which is stated to have been a Bengallee mortgage; the nature of the others does not appear. The mortgagor and the mortgagees were Hindoos. The mortgagees obtained on the 25th May 1847, a decree of foreclosure in the Supreme Court against the mortgagor. This decree was irregularly obtained, and was subsequently set aside. Whilst this decree for foreclosure was in force, *viz.*, on the 10th June 1847, the Debs sold the zemindary to John Compton Abbott. He, after his purchase, in execution of the decree of foreclosure, which he had also purchased, dispossessed the plaintiff. It does not appear that the mortgagees had been in possession. The contrary may be inferred

The possession, then, was first acquired, whilst the foreclosure decree was in force by John Compton Abbott as owner, and not in privity with the mortgage title.

The effect of a foreclosure decree in the Supreme Court in a mortgage suit between Hindoos, is equivalent to a decree establishing proprietary right, in the Company's Courts, on similar suits on the like instruments.

On the 2nd February 1848, the plaintiff filed his Bill of Complaint on the Equity side of the Supreme Court, to set aside this foreclosure decree, and to redeem the zemindary. The Bill was originally filed against the Debs only; but on its appearing, by their answer, that they had sold to Abbott, he was made a party to the suit. After he was made a party to the suit, he entered into an agreement, bearing date the 15th April 1848, with Alexander M'Arthur, which agreement was filed with the plaint, in the suit now under appeal, and is set out at page 5 of the Appendix. This agreement, after reciting that Abbott is well seized of or otherwise entitled to the zemindary, that the same was in arrear for revenue, and was advertised for sale of arrears of revenue, proceeds to stipulate, as between these two persons, that M'Arthur shall purchase the zemindary for the sum of three lacs, in case the estate does not sell for more at the revenue sale; that he will pay to the Government, if he be declared the purchaser, the sum for which the estate may be sold; and that he will, within a certain time after he shall be declared the purchaser, and shall have obtained the usual and due certificate of title, pay to Mr. Abbott the difference between three lacs and the sum for which the estate shall have been sold. At this time the suit of the plaintiff in the Supreme Court for setting aside the foreclosure decree, and for redemption, was pending. The Court, by its decree dated the 16th November 1852, set aside the decree of foreclosure, and thereby made the zemindary in the possession of Abbott, under his title from the Debs, subject to the right of redemption by the plaintiff. This right was expressly declared by the judgment in the following passage:—"We think, therefore, that there must be some decree for redemption against Mr. Abbott, who, if the objections arising upon the form of the record be answered (which objections the Court had overruled), can stand upon no better footing than the Debs, whose title he purchased."

This judgment, then, in effect placed the possession of Abbott upon the footing of that of a mortgagee in possession, and from that time his above-declared title and his possession were in privity with the mortgage title, and no longer constituted an adverse possession. By the reversal of the irregular foreclosure decree, the mortgagor was restored to his original and legal relation to the mortgage title.

After Abbott had been made a party to the redemption suit, Promothonanth Deb, one of the defendants, died; and the suit was revived, and other parties were made defendants by a Bill of Revivor and Supplement. The personal representatives of Promothonanth Deb were made parties, together with the said M'Arthur and one George Lindsay Young, and the Nawab Nazim and the representatives of Sauduck Ally Khan out of the jurisdiction of the Court were also named as defendants. These parties were stated by Mr. Leith to have been introduced as defendants in consequence of some discovery which had been obtained by the answers previously put in. The agreement, however, between Abbott and M'Arthur previously mentioned, of the 15th April 1848, was then unknown to the plaintiff, and the new defendants above mentioned were made parties upon allegations that, at the sale for the arrears of revenue referred to in the agreement, M'Arthur had purchased *benamée* for Abbott and the Debs, and that they had sold to Sauduck Ally Khan, who had purchased *benamée* for the Nawab Nazim. It would swell the narrative of the facts of the case which preceded the present suit to an unnecessary length, if the precedent litigation were followed minutely through all its stages. It will suffice for the purpose of explanation to state that Sauduck Ally Khan and the Nawab Nazim did not appear to the Bill, and that, upon M'Arthur's answer coming in, and it appearing by it that he had conveyed to

Sauduck Ally Khan *benamee* for the Nawab Nazim, he was dismissed from the suit, and a decree for redemption was made against the other parties who had appeared in the suit. This decree bears date the 6th November 1852.

It is set out *in extenso* in the Appendix. This decree, together with the agreement of the 15th of April 1848, and another document, are annexed by the plaintiff to his plaint in the suit now under appeal. The decree declared that the "plaintiff, as between himself and the defendant in those suits, was entitled to redeem the mortgaged premises in the bill mentioned, notwithstanding the said final foreclosure order." The title to redeem was declared as to all the mortgaged premises, and not simply as to those which could be recovered in that suit, though the decree would of course bind those only who were parties to the suit at the time when it was pronounced, and at that time M'Arthur had ceased to be a party to the suit. In a subsequent part of the decree it was further ordered "that the Master should enquire and state to the Court what portions of the mortgaged premises had been sold since the same came into the possession of John Compton Abbott for arrears of Government revenue, or otherwise, and to whom the same respectively had been sold; and if he should find that any had been so sold, he was to take an account of all moneys which had been received by or come into the hands of the said defendant, John Compton Abbott, or any person or persons by his order or for his use in respect of the purchase money arising from such sales, or of the surplus proceeds of such Government sales, if any, or which, but for his or their wilful default, might have been received." This portion of the decree furnishes one of the grounds on which the Judge of the Zillah Court proceeded in his dismissal of the plaintiff's suit.

The decree also directed certain enquiries in the Master's office; and in the due prosecution of those enquiries M'Arthur was subsequently, *viz.*, on the 17th of August 1854, examined before the Master. His examination is stated at length at pp. 18 and 19 of the Appendix. This examination first disclosed to the plaintiff the existence and contents of the agreement between M'Arthur and Abbott of the 15th of April 1848. M'Arthur's examination further disclosed that there was an agreement between him and Abbott, that the latter should suffer the revenue to fall into arrear, in order that the estate might be sold for arrears of revenue; and further that he, Abbott, should not bid for the estate. M'Arthur explained that his reason for wishing Abbott not to bid was to prevent its going above the three lacs.

This discovery seems to have led to the institution of the present suit. The plaint in this suit was filed on the 30th of May 1860.* In the plaint it is stated that possession was given to M'Arthur under the certificate of title, consequent on the sale for arrears of revenue, on the 1st of June 1848. The expression is somewhat confused, but this seems to be the sense of the plaint.

The plaint is for redemption and possession, that is, for possession consequent upon redemption. The relation to this suit of the several parties whom we have above mentioned to have been made defendants to it, sufficiently appears by what has been already stated, except that it must be added that the defendant Sidhee Nuzzur Ally Khan Bahadoor, the appellant, is described as in possession, collusively with the Nawab. The plaintiff in his plaint alleges with respect to all the parties whose interests arose upon and after the sale for arrears of revenue, that is, from the Nawab Nazim inclusively down to and including the present appellant, that they took fraudulently and collusively. It was objected for the appellant, that the plaint does not connect him with that charge of fraud and collusion, but the following words in the plaint, *viz.*, "the collusive, fraudulent, and fictitious auction sale like a private sale," evidently refer to that sale which the plaintiff treats as the fraudulently interposed bar to his redemption, *viz.*, that at which M'Arthur was declared the purchaser; for in a subsequent part of the plaint that sale and the agreement between M'Arthur and Abbott, of the 15th April 1848, are referred to, and the words "and the subsequent transfers," following on the words "the collusive,

fraudulent, and fictitious auction sale like a private sale," plainly mean, as the sense imports, all those transfers between the parties whom the plaintiff makes, in person or by representation, defendants, by derivation of title from the Nawab Nazim, and the words "being declared collusive" import that the plaintiff seeks by his suit to have them so declared. The repetition here of the words "private sale," and the more formal conclusion at pp. 4, 1, 8 and 9 of the Appendix, *viz.* : "As the said sale took place in the mode described above, so it cannot be viewed in the light of a sale for arrears of revenue, but is to be treated as a private one," clearly and sufficiently mark on what legal ground, whether sound or unsound, the plaintiff meant to found his title to redeem as against those of the defendants whom his former decree in the Supreme Court did not reach. We think, therefore, there is sufficient allegation in the plaint to connect the appellant with the charge of fraud and collusion.

The plaintiff swore to the truth of his plaint. The answers of the defendants were then taken. Those of the appellant and of the Nawab Nazim are respectively at p. 10 and p. 16 of the Appendix. That of the appellant, at p. 10 in the 2nd and 3rd Articles, relies on the pendency of the suit in the Supreme Court, and on the plaintiff's right not being established there. In the 4th Article he relies on the special Law of Limitation, Section 24 Act I of 1845, and says that, as the suit is not brought within one year, the sale cannot be set aside. In the 6th he relies on the general Law of Limitation, Section 14, Regulation III of 1793. In the 7th he denies collusion. The answer of the Nawab Nazim raises the same questions on the Law of Limitation of Suits. He objects further, in his third Article, that the Government should have been made a defendant, the suit being to set aside the revenue sale. He denies the charges of fraud and collusion, and insists that, if the plaintiff has been wronged, he has his claim for damages against Abbott and others.

The plaintiff's vakeel was examined by the Court as to the meaning of the plaint and the nature of the fraud charged. That examination, which is at p. 17 of the Record, does not carry the matter farther than the plaint itself. The issues will be found at pages 17 and 18 of the Appendix.

The 1st and 2nd issues are on the Law of Limitation, as above stated.

The 3rd relates to the Government not being a party, "the suit being to reverse the sale."

The 4th is on the effect of the pendency of the suit in the Supreme Court.

The 5th related to the form of the plaint.

The Zillah Judge decided against the plaintiff on the 1st, 2nd, 3rd, 4th, and 5th issues; the defect of form to which the 5th issues related, he declared to be amendable; but as he considered the suit to be barred on the other grounds of the Limitation Law, and the nature of the decree in the Supreme Court, he made no amendment.

The High Court, on appeal, decided that the suit was not brought to set aside the revenue sale; that it was not barred by effluxion of time; that the pendency of the suit in the Supreme Court, at the time of the institution of this suit (afterwards in the High Court, which had been substituted for the Supreme Court), and the decree given in that suit, were no bar to the prosecution of the claim.

The Court considered that M'Arthur and Abbott could not allege their own wrong, and that a trust might be fixed on the estate of M'Arthur in favor of the appellant without disturbing the Government sale; and with this declaration of the law they remanded the cause for trial.

Before entering upon the particular questions raised by this appeal, it may be right to observe that the Courts of India, in disposing of the case, were bound to proceed, as the High Court appears to have proceeded, upon the facts alleged by the plaintiff, and upon the assumption of the truth of those facts. Where a plaintiff on certain alleged facts asks relief, and is unable to obtain a trial of the facts, and

a hearing on the facts that he may establish, by reason of the conclusions of law which the Judge forms on the case in its then condition, justice requires that the Court should proceed upon the plaintiff's allegations. The case must be determined as if it had arisen on a demurrer to a pleading or to evidence where such procedure exists. Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof and are proved. This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts, and their Lordships therefore abstain from expressing any opinion upon the points urged at the Bar, which do not arise out of the plaintiff's pleadings and documentary proofs, or which, if they arise, are not necessary to the decision of this appeal. Observations were made by Mr. Leith upon the omissions in, and nature of the answers put in by the defendants to the respondent's plaint; but their Lordships, for the above reasons, do not think it right to refer to those observations. The answers can only be looked at for the purpose of ascertaining whether they raise the legal bars insisted on. Throughout the following observations their Lordships must be understood to proceed upon a hypothetical case of fraud, and to express no opinion on its truth or probability.

The first bar to the plaintiff's claim set up by the appellant was that of limitation of suit by effluxion of time. The first period of limitation insisted on by the appellant was that under Act I of 1845 Section 24. That objection necessarily supposed the suit to be brought to set aside the revenue sale; this remedy, however, the suit did not seek, but relying on the agreement of the 15th April 1848, antecedent to the sale, the plaintiff claimed a right, as it were, to confess and avoid that sale, by imposing a trust on the estate which passed under it. The question, therefore, as to this period of limitation is, whether the plaintiff is well founded in claiming the right thus claimed by him, in effect whether the plaintiff can treat the auction sale, as against those defendants who rely on it, as a private sale. Before dealing with this point, however, it will be convenient to consider the other period of limitation on which the appellant relies as a bar, the general law of limitation of twelve years. As to this, it is sufficient to observe that, on the allegations in the plaint, that bar cannot be set up; for the title and possession of the defendants against whom the redemption is prayed by this suit, is expressly alleged to be founded on fraud. This period of limitation, therefore, may be laid out of the case; and we come then to what has appeared to their Lordships to be the real question in the case (the question to which we have above referred), whether the plaintiff can, in point of law, insist, notwithstanding the auction sale for arrears of revenue, that, as against him, that sale ought to be viewed as a private sale. The title to redeem in this suit as against the parties subsequent to Abbott is rested on that ground, and the case which the plaintiff alleges by his plaint and by the documentary proof appended to it is one of fraud between Abbott and M'Arthur, to deprive him of his title to redeem the zemindary, by means of a secret purchase of it between them for three lacs of rupees, including a fraudulent device of a sale by auction for arrears of revenue, such arrears to be designedly incurred. By that agreement Abbott would become directly interested that the estate should sell for a low price, since the proceeds would be subject to the mortgagor's claim, and the lower the price obtained at the auction sale the larger the share would be which Abbott would take of the three lacs. Parties to a secret fraud intend it to be secret, and the price realized at the auction sale would alone be known. These facts and conclusions are directly taken and derived from the plaint, and the agreement of the 15th April annexed to it, and from M'Arthur's examination before the Supreme Court, which are all parts of the plaintiff's proofs.

If these facts cannot be displaced, the agreement was undoubtedly a gross fraud on the mortgagor committed by both the actors: in it, *viz.*, Abbott and

M'Arthur. But it was argued that, even if this case were true, the remedy under the Act I of 1845 was for damages only. This argument was in conformity to the opinion of the Zillah Judge. But it is to be observed that this argument assumes the very question under discussion, which is, whether the Act extends to the present case. Mr. Justice Bayley thought that the Act was not designed to protect a fraudulent purchaser. He put his decision on the ground that a man is not allowed by law to take advantage of his own wrong; and he treated the case of such a purchaser as beyond the protection intended to be given by the Act to purchasers under an auction sale.

No authority founded on the decisions of the late Company's Courts was referred to by the Judges of the High Court, and none such has been quoted before their Lordships on the argument of this appeal. The case is, however, not altogether new in India. The question was considered in the decision of the Supreme Court in the cause so often referred to, to which this suit is alleged to be supplemental. Mr. Justice Colville, in that judgment, whilst he declares a Government sale for arrears of revenue to give a title against all the world, with certain exceptions, engrafts on that general rule this exception, that a fraudulent purchase at such auction sale by a mortgagee will not defeat the equity of redemption. The subject is treated in Mr. Arthur Macpherson's book on mortgages, at page 91, who there quotes a prior decision, *Kellsall vs. Freeman*, of the same Supreme Court to the same effect. The author, now a Judge of the High Court at Calcutta, expresses a similar opinion, and as his book is one well known and frequently consulted in India, the decision under review cannot be regarded as unsettling a previously settled state of the law, and as raising for the first time an exception to the general protection which this legislative title affords to purchasers. In support of this view we may refer to other authorities. In the celebrated opinion of C. J. De Grey in the House of Lords in the *Duchess of Kingston's case*, he says, "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the Court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled." "Fraud," his Lordship proceeds to state, is an extrinsic, collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says "it avoids all judicial acts, ecclesiastical or temporal." The Chief Justice then proceeds to state that fines and recoveries may be avoided for covin by strangers, and gives other illustrations of the same principle. The case of *Collins vs. Blantern*, 2 Wils. 341, is an authority to show, if any were needed, that a Court will strip off all disguises from a case of fraud, and look at the transaction as it really is. In addition to these authorities, it may be observed that the principle embodying this distinction pervades the law. Under sales in market overt, the purchaser acquired a title against all the world; but this protection did not extend to a fraudulent buyer who knew that the seller had no real authority to sell. If the thief who sold in market overt re-purchased the article, the defrauded owner could then assert his title against such re-acquisition. See Viner's Abridg. tit. Market Overt. In Bacon's Abridgment, tit. Fraud. p. 768, Gwillim and Dodd's edition, it is said, "If goods are sold in market overt by covin between two, on purpose to bar him that has right, this shall not bar him thereof. 2 Inst. 713. Cro. Eliz. 86." The same principle applies to bills of exchange and other negotiable instruments, made or which become payable to bearer, and pass by delivery.

Again, a title by estoppel is a well-known title. The doctrine that a man cannot take advantage of his own wrong, as used and applied by Mr. Justice Bayley to this title to redeem, is a correct application of that doctrine, if the facts support him. Assuming, as we must, the agreement to be proved, was this sale, as between Abbott and M'Arthur, really meant to be a sale under the revenue laws for arrears of revenue, or was it a device,—part of the machinery, as it were,—to effect a

fraud? Under a private conveyance, in the state of the title and of these parties, the estate, if conveyed by Abbott to M'Arthur, would have been redeemable by the plaintiff. If the sale were intended to have been a real sale under the revenue laws, what would have been Abbott's interest? His estate would have been extinguished, and all that he would have been entitled to would have been a mortgagee's interest in the surplus of the money realized by the sale over the arrears. Would a real vendor seek to reduce that surplus? The price was a fixed sum of three lacs; the parties contemplated a sale under that sum by the auction proceeding; and it may be well to repeat that it was Abbott's interest to cause, as far as he could cause it, that the auction price should be low, since, though the auction-sale was public, his agreement was not known to the mortgagor. What, then, if the sale were to be real, could be the consideration which M'Arthur was to receive for the excess of the three lacs over the auction price? The estate would have passed to him for the lesser sum. This suffices to show that, as between them, the sale was meant to be under the terms of the agreement in the case that has happened, which was a case contemplated by Abbott at least. These parties, therefore, are estopped or precluded by their acts from setting up, as against a third person, the mortgagor, the object of their fraud and a stranger to the agreement, the illegality of the agreement itself. The plaintiff is entitled to say, this agreement is the real contract. Two cases decided by the House of Lords upon the effect of the Encumbered Estates Act for Ireland, *Rooke vs. Errington*, 7 Ho. Lds. 617 and *Power vs. Reeves*, 10 Ho. Lds. 645, were referred to by the appellant's Counsel, in support of the appellant's case, but it is sufficient to say that these were not cases of a fraudulent use of the provisions of an Act of Parliament for effecting a fraudulent purpose. They do not appear to their Lordships in any way to affect the present case.

The various questions that have been put in the course of the argument,—of notice, of knowledge, of purchase by an innocent principal through a fraudulent agent,—need not here be answered. They do not arise on the facts before us. Those facts may not be the real facts. Any opinion expressed upon these points would be not merely an *obiter dictum*, it would be by anticipation an opinion hazarded on supposed facts, and evidence, if the cause be still untried, might be made to fit them.

This decision proceeds entirely upon the ground that, as between these parties, the sale must now be considered as a private sale. The decision has no application to interest derived under a real auction sale. The opinion of their Lordships upon this point disposes of the first bar of limitation by effluxion of time under Act I of 1845.

The questions remaining for consideration are, whether the pendency of the suit in the Supreme Court, or the nature of the decree, or any acting under that decree, present a bar to the prosecution of the suit, which the decree under appeal has remanded for trial on the facts. The mere pendency of the suit cannot operate as a bar, since the suit in the Zillah Court was intended to be simply in furtherance of and supplemental to it. The nature of the decree requires more consideration. Had that decree been one which could not have been modified or varied by further proceedings in the Supreme Court itself, in the nature of a supplemental suit on the new matter discovered since the decree, the objection might have been tenable; but the law of the Court is otherwise. Had the Nawab and the parties defendants subsequent to him been subject to the jurisdiction of the Supreme Court, the relief which is now sought to be obtained against them in the Zillah Court might have been prosecuted by a further suit, in the nature of the supplemental suit, properly constituted in the Supreme Court. The decree, as to the account and the enquiries directed as to alienated lands, might upon the new facts have been varied there, and the same relief may be obtained in this suit. The defendant in possession is charged in substance as assignee of the mortgage, and in that character redemption is prayed against him. The relief is subject to the same conditions and equities which would have attached to it in the Supreme Court.

It would be unjust to exclude the relief by reason of mere personal exemption from the jurisdiction of the Supreme Court. To rely on this bar would be to plead impediment against a suit instituted to remove it. The direction to enquire as to the alienated lands, and the relief consequent on that enquiry, are introduced for the benefit of the mortgagor in case the pledge should turn out to be irrecoverable through the fault of the pledgee. Such relief in this case is in the nature of compensation for a wrong. If it be subsequently discovered that the pledge can be restored or recovered, the mortgagor may waive that benefit, and prosecute his right as to the thing itself. Lastly, with reference to the dealing under the decree, it is to be observed that the mere prosecution of an enquiry, especially under a mistaken impression, would not raise a case of election, or amount to a waiver of a tort. This is all that the facts alleged disclose. They disclose that, at the time of the decree, the estate was supposed to be irrecoverable, and that the Court, in directing the enquiries which it directed, acted on that impression. They do not disclose what has been done in the way of satisfaction under the decree. The case alleged in this suit is one of fraudulent misdealing with the property pledged. The case of *Hope vs. Liddell* 21 Bevan, p. 183, quoted by the Attorney-General, was not a case of fraud. The observations of Lord St. Leonards, quoted by the Master of the Rolls, relate to a *bonâ fide* purchaser for value, and to the proper mode of working out his equity against that of a plaintiff whose property has been alienated by mistake.

The facts in the case of *Hope vs. Liddell* differ widely from the alleged facts in the case under appeal; and the grounds on which that decision proceeded do not exist in this case, as it now appears. In the case *Hope vs. Liddell*, the original testator, Dr. Spencer, devised the lands in dispute to one Thompson, a trustee, on certain trusts. Thompson devised all his estates, by general words, to his sister, Grace Thompson. This devise was erroneously supposed to pass the trust estate, which really went by descent to the heir at law of the trustee. One of the *cestui que trusts* contracted to sell the estate to the defendant Liddell. The sale was perfectly *bonâ fide* on both sides. The price was adequate, and was paid. It was paid by the purchaser into the hand of the *cestui que trust* by the direction of the supposed trustee, Grace Thompson. The purchaser was by the trust deed not required to see to the application of the purchase money. The Court said that if Grace Thompson had really been the devisee in trust, as she was supposed by all to be, the transaction could not have been impeached. The defect was the want of the legal estate. On the second question in the cause, the Court found that the children, the objects of the trust, had, with full knowledge of all the circumstances and of their rights, taken to the purchase money in lieu of the land. In this case, however, at the time of the decree in the Supreme Court, it was supposed that the land was gone irredeemably. In that state of belief there could have been no matters between which to choose. Afterwards, when it was discovered that the auction sale had been contrived under the agreement of the 15th April 1848, a new state of facts appeared. The matters between which to elect would then have been the land, and the full price the three lacs, not simply the auction price. Nothing appears further on the alleged facts, except that the enquiry before the Master went on; but that it might well do, subject to final correction and due adjustment. There is no ground, therefore, for applying the decision of *Hope vs. Liddell* as an authority to govern this case in the present state of the facts.

This same cause which has induced their Lordships to refrain, in the earlier part of this judgment, from expressing an opinion upon the law applicable to an unascertained state of facts, operates also here to induce reserve. Distinctions may exist between claims of this nature, founded on actual fraud by a combination between several wrong-doers, all liable to make satisfaction up to one complete satisfaction for the injury done, between whom there may be, *inter se*, no right to contribution and remedies founded on contract, or converted by the choice of the sufferer into claims *ex contractu*; but, for the reasons already given, this subject cannot

now be pursued further. Their Lordships will humbly recommend to Her Majesty that this appeal be dismissed with costs.

The 17th March 1866.

Present :

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. Colvile, Sir E. V. Williams,
and Sir L. Peel.

Unlawful attachment—Resistance—Damages—Costs.

On Appeal from the Sudder Dewanny Adawlut at Agra.

Mohun Doss,

versus

Gokul Doss.

A, having a right to sell an Indigo Factory pledged to him subject to the rights of *B* under his prior mortgage, has no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property in order to attach the Factory as a step towards the judicial sale. *B*'s resistance of *A*'s unlawful attachment does not bar *B*'s claim to damages for loss sustained by him consequent on the attachment. A man whose possession is unlawfully invaded, is not bound to give effect to that invasion because it is made under colour of legal process.

In actions of *tort*, a plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage laid, unless the special damage is the *gist* of the action; and as in the present case the gist of the action was, not the special damage, but the unlawful attachment, the plaintiff was declared not precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

No case having been made for taking fresh evidence with a view to the assessment of damages in India, the Privy Council assessed the damages themselves; and although the amount so awarded (rupees 500) fell far short of the appealable sum of rupees 10,000, yet as, unless the claim had been thus unduly magnified, the appellant could not have appealed to Her Majesty, the Privy Council directed the costs of the Courts in India to be apportioned according to the ordinary practice of those Courts, leaving the costs of the appeal to the Privy Council to be borne by each party.

THIS is an appeal against a decree of the Sudder Court of Agra, which confirmed a decree of the Civil Court of Mirzapore, dismissing the appellant's suit with costs.

The suit was brought to recover the damages alleged to have been sustained by the nominal plaintiff's employer, Dwarka Doss, in consequence of an attachment made at the instance of the respondent as the holder of a decree.

Dwarka Doss and the respondent had conflicting claims upon an indigo factory lying between the villages of Putteetah and Sirswabur, and called in the record sometimes by the one and sometimes by the other name. This factory, with three others, belonged to two persons named Chunder Churun and Esserchund Neoghy.

At the beginning of the year 1856 the Neoghys were indebted to Mussumat Ooman Soondree, the wife of Tara Pershun Bagjee, in the sum of rupees 17,701, partly for moneys advanced by her, and partly for moneys advanced by Dwarka Doss on her husband's guarantee, for the purpose of carrying on the factories; and those advances were secured by certain instruments of mortgage dated the 20th of January 1852, the 18th of April 1853, and the 1st of January 1856. These securities embraced the block of all the factories and their crops at least for the year 1856-57.

On the 1st of January 1856, Mussumat Ooman Soondree, by an instrument called a deed of re-mortgage, assigned all her interest in the factories under the before-mentioned securities of Dwarka Doss, in order to secure the sum of rupees 9,761, being the balance then due in respect of his former advances, together with the future advances to be made by him for carrying on the factories. And it was thereby provided that he should take the factories under his control and management during the year 1263 Fuslee, or 1856-1857; thereby giving him the first charge or lien on the crop.

It does not very clearly appear whether under this stipulation he took possession of the factories ; or, if he did so, how long he continued in possession. But on the 7th of July 1859, he obtained a decree in the Civil Court of Benares against Mussumat Ooman Soondree and the Neoghys, for the sum of rupees 23,672 as then due to him upon his mortgage ; and on the 15th of the same month he and the Neoghys filed in Court a petition embodying the terms of a compromise into which they had entered. The effect of this was that Dwarka Doss was to suspend the execution which he had taken out under the decree for rupees 23,672 ; was to advance further sums for manufacturing indigo from the stumps then on the ground ; and was to have the disposal of all the indigo manufactured. The works were to be superintended by one Balgobind Doss Seith, whom the Neoghys had nominated as their agent for that purpose. The rights of Dwarka Doss under the execution for any balance that might remain to him after the sale of indigo, were expressly reserved to him both against the factories and against all the defendants to his suit. This arrangement was carried out by placing a servant or agent of Dwarka Doss in charge of the factories.

On the day on which this instrument of compromise was filed in the Benares Court (the 15th of July 1859), the respondent obtained a decree in the Court of the Principal Sudder Ameen of Mirzapore against the Neoghys for the sum of rupees 764 alleged to be due to him upon a mortgage of the Putteetah factory, dated in Phalagoon Budee 1st, Sumbut 1911 (being sometime in A. D. 1855). Dwarka Doss intervened in this suit, as an objector, insisting that the factory had been attached for money due to him, and that the claim was fraudulent. But the Principal Sudder Ameen held that the objection could not be tried in that suit, and was no bar to the making of the usual decree in a suit based upon a simple mortgage-bond. He accordingly passed the ordinary decree against the defendants (the Neoghys) and the mortgaged property for the sum found due.

The respondent took out execution on this decree for rupees 878-10. He first obtained an order for the attachment of both the Putteetah factory and another factory known as the Soorma factory, with the appurtenances of each, and of fifty maunds of indigo alleged to be at the former, and of thirty maunds of indigo or thereabouts alleged to be at the latter factory.

But on the 17th of September he made a further application to the Court, wherein he expressed his desire to abandon the execution against the Soorma factory, and submitted a more detailed list of the property at the Putteetah factory. He limited also the quantity of indigo to be attached at his suit to eight maunds. The order of the Court was that the attachment should be limited to the property comprised in this last list.

On the 23rd of September, the Ameen, accompanied by two servants of the respondent who went to point out the property, proceeds to attach the factory and other property detailed in the application of the 17th of September. He made an actual entry upon the lands, and took an inventory of the property attached. He could not, however, complete the attachment of the eight maunds of indigo by actual seizure. These were part of a much larger quantity kept in a storehouse which was under lock and key ; and the servants of Dwarka Doss refused to give him access to the storehouse, or to remove this lock. In these circumstances he put his own lock also upon the door, and retired, leaving two peons in charge of the property attached.

The appellant, having heard of the applications for the attachment, had on the 22nd of September applied to stay it. But as the Dusserah holidays, during which the Courts are closed for some weeks, began on the 24th, this application was ordered to stand over until after the vacation ; and the same cause prevented any further application touching the actual attachment.

In October, the Ameen, armed with a Magistrate's order, and accompanied by a blacksmith, went to the storehouse for the purpose of breaking Dwarka Doss's lock,

but appears to have desisted on the threat of the people in charge of the factory to quit the premises if the lock was broken, and to leave him responsible for all the indigo there.

On the 5th of November, these circumstances having been brought to the notice of the Principal Sudder Ameen, he passed an order to the effect that, if the defendants to the respondent's suit, or their agents, should fail to appear in Court within a week and substantiate their objection to the opening of their lock, it should be broken, and the eight maunds of indigo be forcibly attached.

On the same day he required the respondent, as the decree-holder, to answer the appellant's objection of the 22nd of September within four days.

On the 25th November, the Ameen having in the meantime received no order to suspend the attachment of the indigo, proceeded, under the order of the 5th November, to remove the lock; attached eight maunds of indigo pointed out to him by a servant of the respondent; and made two inventories, one of the eight maunds of indigo attached, the other of the other property found in the storehouse, which was not attached. Owing, however, to some difficulty about weighing the indigo, all this property remained in the storehouse, apparently under lock of the Ameen, or in charge of his peons, until the 8th of December, when the eight maunds were finally weighed and removed to a separate place, and the other contents of the storehouse were left at the disposal of Dwarka Doss's people.

On the 12th of December, the Ameen submitted to the Court a further report of his proceedings, and stated that he had, according to the respondent's request, attached no property belonging to the factory except the eight maunds of indigo. The objection filed by the appellant on the 22nd of September appears to have been thenceforward confined to these; and it was finally disposed of by an order of the 3rd of January 1860, which, on the ground of the preferential claim of Dwarka Doss, directed the release of the eight maunds of indigo from attachment.

Some difficulty in carrying out this order was occasioned by the refusal of Dwarka Doss's agents to receive back this indigo except on terms with which the Ameen would not comply; but ultimately the eight maunds, and whatever else had been under attachment, were, by order of the Court, left at the disposal of those who were in possession and charge of the factory; and the peons were withdrawn from the premises on the 28th of February 1860.

Upon this statement of admitted facts it appears clear to their Lordships that Dwarka Doss had, by reason of the attachment of the 23rd of September and subsequent proceedings, sustained an injury for which he was entitled to claim substantial damages. The attachment was wrongful and irregular. The right of the respondent, under his decree, was to sell the factory pledged to him, subject to the rights of Dwarka Doss under his prior mortgage. He had no right to invade or disturb the possession of the prior mortgagee by placing peons upon the property, in order to attach the factory as a step towards the judicial sale. Under the procedure, as it existed before 1859, this could not have been done. The attachment must have been constructive. But under the new Code of Procedure, which had come into force on the 1st of July 1859, the proper course was to issue and publish a written notice under the 235th and 239th Sections of Act VIII of 1859. For the actual seizure of the eight maunds of indigo, to which the execution was ultimately reduced, there was even less justification. The manufactured indigo was not included in the respondent's mortgage. And that it was not part of the general property in the possession of the Neoghyss, that Dwarka Doss had or claimed a lien upon it, the respondent had had ample notice in his own suit, wherein Dwarka Doss had intervened as objector, and by the proceedings of the 12th of May 1859, touching a distress for rent which has been put in evidence in the cause. And the manner in which this wrongful attachment was carried out, the placing by the Ameen of his lock upon the door, subjected Dwarka Doss to the additional wrong of having the contents of the godown, to which *ultra* the eight maunds of

Indigo, the respondent made no claim, taken out of his control and dominion from the 23rd of September until the 8th of December. It is idle to say that his people ought, in the first instance, to have given the Ameen access to the godown, and delivered the eight maunds of indigo, or that they ought to have acted according to the directions of the Ameen concerning the use of the two locks, supposing those directions to have been given to the peons. The case cited by Mr. Leith from Bingham's Reports shows that in this country a plaintiff in an action for a trespass of very similar character, may, without proving special damage, recover substantial damages. Nor can it be said that in this case there is no evidence of the malicious character which the plaint imputes to the trespass.

The plaint in this case was filed on the 25th of February 1860. The damages claimed were all in the nature of special damages, and consisted of three items, *viz.*, 14,000 rupees "on account of loss of 70 maunds of indigo at 200 rupees per maund;" 5,545 rupees on account of indigo which it was alleged Dwarka Doss was prevented from manufacturing from indigo plants; and 2,250 rupees on account of indigo which it was alleged he was prevented from manufacturing from indigo stumps.

Both the Courts below have found, and their Lordships can see in the evidence no sufficient grounds for disputing the justice of that finding, that the plaintiff has failed to establish any claim to damages in respect of indigo which, but for the wrongful attachment, might have been manufactured from either plants or stumps. The evidence shows pretty clearly that there had been no indigo plant to be manufactured, and leaves it more than doubtful whether all the stumps had not been converted into indigo before the 23rd of September; and whether, if any had then remained to be used in the manufacture of indigo, the attachment would have prevented them from being so used. The two last items of damage may, therefore, be dismissed from consideration.

The claim, however, to recover damages for loss on account of the manufactured indigo was disposed of by the Courts below in a different way. The Principal Sudder Ameen held that, though the plaintiff did probably, as stated by the European indigo factors, sustain some trifling loss owing to the storehouse having remained locked up, this was due "to the refusal of his agent to unlock the door on the Ameen's application, and that this resistance of a legal process on their part, joined with a disposition to break the peace, caused the loss to the plaintiff." And the Sudder Court considered that no good proof had been furnished that the plaintiff's agents were ever prevented from having free access to the godown for the purpose of turning and drying the indigo cakes; but that, on the other hand, the plaintiff, instead of entering his objections in a legitimate way to the attachment of the property, did, through his agents, contumaciously obstruct the Ameen employed to distrain. The learned Judges seem to rest the first of their conclusions partly on the ground that the plaintiff ought not to have kept his lock on the godown; partly on the evidence given by the Ameen of his instructions to the peons to open his lock whenever the plaintiff's people opened theirs.

Their Lordships think that neither Court has assigned grounds which warrant the conclusion at which both have arrived. They have already expressed their opinion that the attachment was wrongful. The proposition that a man whose possession was wrongfully invaded ought to have given effect to that invasion, because it was made under colour of legal process, by removing the lock of his own storehouse, appears to them to be untenable. The argument that the plaintiff ought to have entered his objection in a legitimate way is met by the facts that he had already entered an objection to the execution, and that, by reason of the closing of the Court during the Dusserah vacation, he could neither follow up that objection, nor make any further objection to the acts of the Ameen until the holidays were over. Again, the case of *Bayliss vs. Fisher*, 7 Bing., already referred to, shows that even if the instructions said to have been given by the Ameen to the

peons were really given (as to which there is a conflict of evidence), the plaintiff was neither bound to accept the permission to use his own property so accorded to him; nor, if he had accepted it, would have lost his right of action. It appears, therefore, to their Lordships that the plaintiff's suit have been improperly dismissed with costs; and that he was, at the very least, entitled to a judgment for nominal damages. If it be important in India to check any tendency to resist the execution of legal process, it is hardly less important to maintain the principle that they who misuse legal process are responsible for the consequences of that misuse.

It has been argued for the respondent that the suit was properly dismissed, inasmuch as the appellant was, by the form of his plaint, limited to the three heads of special damage therein laid; and, having failed to prove any such special damage, was precluded from recovering general damages for the trespass.

Their Lordships, however, are of opinion that there was evidence in the cause on which the Courts below might have awarded some damages on account of the loss sustained in respect of the manufactured indigo. Nor are they prepared to allow that, if this had not been the case, the plaintiff could have recovered nothing. The plaint might have been more accurately drawn, but substantially it seeks damages generally, as consequent on the wrongful attachment of the factory. The principle ordinarily applied to actions of *tort* is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the *gist* of the action. Thus in an action of slander for words actionable *per se*, when the plaintiff lays special damages, and fails to prove it, he is nevertheless entitled to such damages as the Jury think right to give him. It would be otherwise if the words were not actionable *per se*. In the present case the *gist* of the action is not the special damage, but the unlawful attachment; and the plaintiff would not have been precluded from recovering ordinary damages for that actionable wrong, even if he had wholly failed to prove the special damage laid.

Taking this view of the case, their Lordships feel that it is not desirable to remit the cause for the assessment of damages in India, since no case has been made for taking fresh evidence, and the Judge below would have only those materials for judgment which are now before their Lordships.

They have, therefore, determined to take the course which was taken by this Committee in the case of *Le Breton vs. Ennis*, 4 Moore's P. C. Reports, p. 323, and to assess the damages themselves. It must be confessed that the appellant has not given the best evidence that he could have given on this point. He might have proved for what the indigo had been sold, and for what it might have been sold if it had not been damaged and had been sold at the proper time. Weighing, however, all the circumstances of the case, their Lordships feel justified in assessing the damages at rupees 500.

Their Lordships have felt some difficulty about the costs in the Courts below, and those of this appeal. The costs of an action in India, particularly the stamp duties payable on the proceedings, depend a good deal on the value of the thing claimed. It is accordingly the practice of the Courts in India, when a plaintiff has recovered less than he has claimed, to apportion the costs in the proportion which the amount recovered bears to that which was claimed. In the present case there are strong indications of a bad feeling between the parties, which, if it prompted the original attachment, has probably, on the other hand, induced the appellant to swell his demand beyond all reasonable bounds. The evidence affords no grounds for a claim for damages amounting to the appealable sum of rupees 10,000; and the amount actually recovered falls far short of that sum. Yet, unless the claim had been thus unduly magnified, the appellant could not have appealed to Her Majesty.

In these circumstances, their Lordships think they must direct the costs below to be apportioned according to the ordinary course of the Courts below, and that

they ought not to give to either party the costs of this appeal. In making the apportionment, the appellant will, of course, receive credit for any costs which he may have paid under the decrees reversed.

The order, therefore, which their Lordships will humbly recommend Her Majesty to make is, that the decrees both of the Sudder Court and of the Civil Court of Mirzapore be reversed; that the appellant be declared entitled to recover damages to the amount of Rupees 500; that the cause be sent back to the Sudder Court, with directions to enter judgment for the plaintiff for that sum, and to deal with the costs in both the Courts below according to the practice of those Courts in like cases; and that each party do bear his own costs of this Appeal.

The 3rd November 1866.

Present :

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Judgment—Pleadings—Principal and Agent.

On Appeal from the High Court of Judicature at Calcutta.

Eshanchunder Sing,

versus

Shamachurn Bhutto.

The determination in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made.

If a man send an agent, with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction and bids for the estate which is knocked down to him, but collaterally and in a bye manner enters into a distinct and separate contract with an individual that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum—the principal cannot be bound by this bye transaction on the part of the agent.

THIS is an appeal from the decision given by the High Court of Calcutta reversing a judgment of the Court of the Principal Sudder Ameen of Santipore. The case is one of considerable importance, and their Lordships desire to take advantage of it, for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. Unfortunately, in the present instance, the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid not only of allegation, but also of evidence in support of it.

The case made by the plaintiff alleges a distinct agreement between the plaintiff and two brothers (whose names have been pronounced in a short manner—the one Koilas, and the other Eshen) that the three should be joint purchasers and joint owners—owners in common at all events—of a certain lease which was put up by a zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that the lease was taken by Koilas on his own behalf and on behalf of Eshen and on behalf of the plaintiff, and that, in conformity with the agreement between the three, Koilas subsequently executed an instrument for the purpose of giving effect to the agreement. The allegations therefore of the plaint are inconsistent with the hypothesis of Koilas having no interest and acting in the transaction as agent only of Eshen. The plaint also proceeds upon a clear and well-defined ground of relief, *viz.*, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between Koilas and Eshen of principal and agent, and from the alleged fact of Koilas, in the execution of his authority, having given certain rights and interests to the plaintiff without which his principal (Eshen) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of case is plain.

The decision of the Court of first instance, that of the Principal Sudder Ameen, found the facts of the case to be in direct contradiction to the allegations contained in the plaint. It was found that Koilas had no interest at all; that the money paid to the lessor was not money in which Koilas had any interest or right; that Koilas acted from the beginning under the authority and as the agent only of Eshen; that the contract was completed with the money of Eshen; and that there is nothing at all to show that Eshen in any manner was made aware of, or was party or privy to the alleged transactions between, Koilas and the plaintiff. These facts being established by the judgment, and being therefore binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case, wholly inconsistent with the recorded findings contained in the original judgment. That original judgment was the subject of an intermediate appeal, which however does not vary the matter, because the Judge of the first Court of Appeal thought it right to dismiss that application and to affirm the original judgment.

We now come to consider the assumed state of facts which is the basis of the decision of the High Court. The High Court takes it that Koilas was nothing more than the agent of Eshen; but the High Court appears to have in some manner or other arrived at this conclusion which does not appear to their Lordships to be warranted either by allegation or evidence, *viz.*, that at the auction, or previous to the auction, there was an agreement between the plaintiff and Koilas that the plaintiff should abstain from bidding, and that in consequence of that abstinence on the part of the plaintiff, Koilas succeeded in obtaining the estate at a less sum of money than otherwise he would have had to give, and that the defendant Eshen took possession of the property with the knowledge of that transaction, on the part of Koilas. It is obvious that every one of these propositions of fact is a statement which it was incumbent on the plaintiff to have distinctly alleged, in order that it might be the subject of direct testimony. It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded and, by joining issue in the cause, has undertaken to prove.

It is unnecessary, therefore, to say that it is impossible for their Lordships to accept anything like those conclusions of fact as furnishing a *ratio decidendi* in the present case. Without adverting further to its being incompetent to the Court of Appeal to substitute a new statement of facts for that originally contained in the record, their Lordships further observe that, even if the case substituted were admitted to be true, and to be the competent subject of judicial enquiry, the legal conclusion which is attempted to be derived from those facts is not consistent with the settled principles of law or equity. Supposing it to be the case that a man sends an agent with direct authority and positive directions to bid at an auction and to purchase an estate, and the agent accordingly goes to the auction, and, in the execution of that authority, he does bid, and the estate is knocked down to him; but collaterally and in a bye manner he enters into a distinct and separate contract with an individual, that, in consequence of something to be done or to be forborne, he will pledge his principal to pay to that individual a certain sum; it is quite plain that, upon every consideration of justice, the principal cannot be bound by this bye transaction on the part of the agent. If the agent makes a contract on the part of the principal, having a definite authority, and he exceeds that authority by inserting a term in the contract itself, it would not be competent to the principal to say, "I will repudiate the inserted term in the contract, as being *ultra vires* unauthorized, but I will obtain performance of the rest of the contract." In such a case

although the agent had no authority for the additional term, yet, as it is an integral part of the contract itself, and the party selling was not aware of the want of authority, the principal could not enforce that contract without giving effect to the additional term. But in the other case, the act of the agent, if effect were given to it, would subject the principal, not only to the contract which he authorized, and which he may be required by the vendor or lessor to fulfil, but also to an additional liability which he never contemplated.

Their Lordships are obliged to disapprove of the decision that has been come to by the High Court. They desire to have the rule observed that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from, and they could not concur in the conclusion of law which has been drawn by the Court below, even if they were at liberty to take into consideration the state of facts which that Court assumed.

Their Lordships, therefore, will advise Her Majesty to reverse the decree that has been appealed from; thereby confirming the original decree and the decree of the Zillah Court, and to give the appellant the costs of this appeal, the application to the High Court being directed to be refused with costs.

The 16th November 1866.

Present :

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Sale in execution—Allegation of benamsee purchase—Onus probandi—Examination of witnesses by High Court.

On Appeal from the High Court of Judicature at Fort William in Bengal.

Sreemunchunder Dey,

versus

Gopaul Chunder Chuckerbutty and another.

Where a person became the purchaser of a talook under a decree for sale obtained by judgment-creditors of the owner, and an assignee of a judgment-creditor sued to have it declared that the purchase did not effect any transfer of the ownership of the talook,—HELD that the *onus* was on the plaintiff to prove that the talook in question was still the property of the judgment-debtors and not the property of the purchaser. In matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds established by legal testimony.

In considering a case of alleged fraud in the purchase of an estate, it is material to enquire what relation the purchase-money paid bore to the value of the estate.

The power given to the High Court by the Code of Civil Procedure, of taking of its own motion original evidence anew, should be exercised very sparingly, and when exercised, it is desirable that the reasons for exercising it should always be recorded or minuted by the Court in the proceedings.

THE appellant in this case became the purchaser of the talook under a decree for sale obtained by judgment-creditors of the owner.

A summary application, to set aside the sale, having been refused, the respondent brought the present action for the purpose of having it declared that the purchase did not effect any transfer of the ownership of the talook.

The respondent is not himself a judgment-creditor, but he is the assignee of a judgment-creditor. It appears that the respondent is a tenant upon the estate, and that, after some dispute had arisen between the tenants and the appellant, he purchased this outstanding judgment, and, by virtue of that purchase and a transfer of the judgment, has taken the present proceedings. The issue which was raised in the action so brought by the respondent, and the affirmative of which he has to maintain, is that the talook in question is still the property of the judgment-debtors, and not the property of appellant, who was the purchaser. The affirmative lies upon the respondent; he is to prove his case.

Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that

the decision of the Court rests, not upon suspicion, but upon legal grounds, established by legal testimony.

The case relied upon by the respondent is mainly this,—that the purchase-money, which appears to have been actually paid by the appellant, was not in reality the money of the appellant.

In considering a case of alleged fraud in the purchase of an estate, it is material to enquire what relation the purchase-money paid bore to the value of the estate. We have here a statement made by the respondent himself, that the talook was worth about 19,200 or 19,300 rupees, and we find that it was sold at the sale at which the appellant (being the assignee of the original bidder) became the purchaser for 19,000 rupees, which was actually paid.

That circumstance is not conclusive proof of a *bond fide* purchase; but it is a strong circumstance, in considering a case which consists of allegations, that there was a collusive agreement between the judgment-debtor, that is, the original owner of the estate, and the appellant, to buy in the estate for the benefit of the judgment-debtor.

The transaction appears to have been this:—A person of the name of Petumber attended the sale as the agent of another person, who appears to be a man of property, of the name of Mohesh Chunder. Petumber was declared best bidder, and consequently the purchaser. It seems from the evidence that Petumber exceeded the authority which had been given to him by Mohesh Chunder, his principal. Mohesh Chunder had limited the price to be given to a sum of money less than the amount which Petumber had bid; Mohesh Chunder therefore either repudiated the contract or was desirous of getting rid of it. In that state of things Petumber applied to the appellant to take a transfer of the contract, and the appellant agreed so to do. The reason for the appellant purchasing the property does not appear. It does not appear, nor is there any testimony that would warrant at all the inference that Mohesh Chunder in sending Petumber to the auction was acting as the agent or on behalf of the judgment-debtor. It is said that Mohesh Chunder was a distant relation of the judgment-debtor, but there is nothing like testimony to warrant the conclusion that Mohesh Chunder was acting on behalf of the judgment-debtor.

No doubt that would not be material, if it were proved that the appellant, the assignee of Petumber, was himself the agent or trustee of the judgment-debtor. If he was so, of course the estate in the hands of the appellant might be made available for the satisfaction of the judgment-debts existing unsatisfied.

To prove this, the circumstances relied on by the respondent, are, first, the fact which it is alleged appears on the judicial proceedings under which the sale was made, that two previous sales had been effected of this property, in both of which the real, though not the apparent, purchaser was the judgment-debtor, and that those sales had consequently been set aside. The Courts below and the respondent here appear to have considered that those facts justified the inference that the judgment-debtor had formed the design in the present case, for the third time, to acquire the property through the instrumentality of a person acting apparently on his own behalf.

Although the fact of these former sales may be referred to, as they appear on the proceedings in the cause in which the sale was made, yet no legal inference affecting the integrity of the present proceeding can with any propriety be drawn from them.

The next circumstance relied upon by the respondent is this: that the appellant and the judgment-debtor appear to live still on good terms together; that they are not open and avowed enemies, which it is said would have been the necessary consequence if the appellant had in reality been the purchaser of the judgment-debtor's estate for his own benefit.

That is a circumstance, again, from which we are of opinion that no legal inference results.

The next thing relied upon by the respondent, and which is one of the main grounds of his case is this:—that the appellant is unable to give a satisfactory account, nay, may be supposed perhaps to have given a false account in part, as to the manner in which he became possessed of the money in question.

Their Lordships have been much struck with the unsatisfactory character of the account given by the appellant of the manner in which he alleges he obtained the money; but we cannot help feeling that it is an enquiry upon which it is not very difficult to suppose that the person who becomes the purchaser of an estate may be unwilling to give a very full statement. But this circumstance, although it may excite doubt, is not a thing from which we can legitimately infer that the appellant was a bare trustee of the purchase so made by him.

And if it inclined us to doubt the appellant's ownership of the money, there is still a great interval between that doubt, and the conclusion that it was the money of the judgment-debtor, or that the appellant acted in the matter on his behalf.

It is for the plaintiff to prove that the money was the money of the judgment-debtor, or that it was supplied or found by some third person for the benefit of the judgment-debtor; but we find nothing which can be accepted either as direct proof of the fact, or as materials from which any such inference can be justly drawn. Two witnesses, called by the respondent himself, state that, as far as their knowledge extends, the circumstances and the condition of the judgment-debtors were such that they had not the means of supplying the money in question. The other evidence given by the respondent is that a person of the name of Mohesh Chunder, some time after the transfer of the contract to the appellant, raised a sum of 19,000 rupees, and that Mohesh Chunder was a friend and second cousin of the judgment-debtor, and therefore the respondent would have us infer that the 19,000 rupees so raised by Mohesh Chunder, being about the amount of the purchase-money for the talook, was raised by him on behalf of the judgment-debtor for the purpose of completing the purchase of the talook, or of repaying the money which it appears the appellant obtained from certain bankers at Calcutta, in order to complete his purchase.

We are asked, therefore, to hold that the distant connection between Mohesh Chunder and the judgment-debtor, and the equality in amount of the sums are sufficient grounds for the conclusion that the purchase-money was in reality the money of Mohesh Chunder, and that he found and advanced it for the benefit of the judgment-debtor. If we were to take away men's estates upon inferences derived from such circumstances as these, it would be impossible that any property could be safe.

It is material that this purchase is not really challenged by the judgment-creditors. They have not originated this action, but it is the fruit of the angry feeling of a tenant on the estate, who has sought out a judgment-creditor, and got a transfer of his interest for the purpose of bringing forward this claim; and therefore the origin of the action and the circumstances under which it is brought are to be taken into account, when we are considering the truth and reality of the purchase by the appellant.

It is natural to suppose that, if this purchase had been generally felt not to be *bonâ fide* purchase, it would have been questioned by the judgment-creditors themselves, and that they would not probably, for a small consideration, have parted with their judgments to another person, but would have instituted the suit themselves.

In the conduct of the suit, there is a circumstance which their Lordships think it right to advert to.

When the matter came up by appeal to the High Court, the High Court was dissatisfied with the reasons given by the Court below, and with the evidence taken in it; and the High Court, acting apparently *ex mero motu*, and not at the instance of the parties, determined to take original evidence anew, by the examination of

other witnesses. It is a power given by the Code to the High Court, which may be very wholesome ; but it is desirable that the reasons for exercising that power should always be recorded or minuted by the High Court on the proceedings. A power of that character should be exercised very sparingly ; because, where it is done not at the instance of the parties, but at the suggestion of the Court itself, witnesses may be called who are not the witnesses that the parties themselves would have thought fit to adduce ; and it is possible (which appears to be the case here) that the new original enquiry by the Court may be in itself imperfect, and not sufficiently extensive to answer the purposes of justice.

The opinion of their Lordships is that the evidence which has been given (there having been the fullest opportunity of giving evidence against the appellant) is not sufficient to warrant the conclusion that the appellant was acting as the agent of the judgment-debtor.

It is easy to suppose a case in which the appellant might not in reality be the *bond fide* purchaser on his own account, and yet in which there would be no ground for holding that the estate was the property of the judgment-debtor. It is possible to suppose that some of the family of the judgment-debtor might have been willing to find, either wholly or partly, the money for the purchase ; but if it were established that the money was not the property of the appellant, we could not derive from that the conclusion that the estate was therefore the property of the judgment-debtor.

It was said by the Counsel for the respondent that no other owner was suggested by the appellant. There was no obligation upon him to suggest any other owner. He was under no obligation to show whence the money was derived ; but taking everything against the appellant upon that point, there is still a great chasm between that inference and the conclusion which alone would support the action of the respondent, *viz.*, that the estate is the judgment-debtor's property, both at law and in equity. That is neither established, nor can be legitimately inferred from any of the facts which have been proved.

We are, therefore, of opinion that the decree of the Court below must be reversed, and we shall humbly advise Her Majesty to order that it be reversed accordingly ; and that the action of the respondent in the Court below be dismissed with costs. It follows that the appellant must have the costs of this appeal.

The 17th November 1866.

Present :

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Loan—Interest,

On Appeal from the High Court of Judicature at Calcutta.

Charles Séfton Guthrie and Sophia his wife,

versus

Frederick George Lister.

Where a contract of loan stipulated that the legally demandable rate of interest should be 5 per cent., it was held that a claim by the creditor of interest at 8 per cent., founded upon a bare promise of the debtor to pay 8 per cent., or upon the fact that the debtor had in account voluntarily debited himself with 8 per cent. in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum*.

THIS is a suit of a painful nature, which has arisen between a daughter and her father, touching the rate of interest payable upon a loan made by the father to her deceased husband.

We think there was no necessity for any of the observations which have been made in the Court below, touching the evidence given by General Lister. It

appears to us that the account given of the transaction is reasonably consistent and clear from the beginning to the end.

It appears that Mr. Henry Inglis, the son-in-law of General Lister, was engaged in trade; that the trade was lucrative; and that he applied to General Lister to advance him money to be employed by him in that trade. General Lister assented, and lent to his son-in-law, on two several occasions in the same year, two sums of money, one amounting to 41,900 rupees, the other amounting to 19,500 rupees. On the occasion of these advances, two promissory notes were given by his son-in-law to General Lister, and in both those notes (because, although one only is produced, it has been admitted at the bar that there was another, and that the other must be taken to have been of the same tenor with that which is produced), there is a promise by the borrower, Mr. Inglis, to repay the money borrowed with interest at 5 per cent, at the expiration of three years. The contention, now, on the part of the General, the lender of the money, is that he is entitled to interest at the rate of 8 per cent.; that his interest is not to be limited to 5 per cent., which is the prescribed rate of interest in the promissory notes. He might maintain that contention by proving either that at the end of the three years, the time for the repayment of the money, he forbore to press for the money, in consideration of an augmented rate of interest, or he might maintain that the contract, of the terms of which the notes are evidence, was superseded by a new contract, which allowed the money to remain for a longer period of time than three years, at an augmented rate of interest. But unless some such case can be proved, a claim of interest at 8 per cent. founded upon a bare promise of the debtor to pay 8 per cent. or upon the fact that the debtor has in account voluntarily debited himself with 8 per cent. in lieu of 5 per cent., could not be maintained in law for want of consideration, amounting merely to *nudum pactum*.

It is satisfactory to find that the history of the introduction of the 8 per cent. into the dealings between the parties is very clearly given by General Lister himself; and it is a history which is very creditable to his son-in-law, Mr. Inglis, but which is inconsistent with the General's founding upon the circumstances any legal claim. We prefer to the allegations now made in the plaint,—we prefer to take the letter of General Lister addressed to his daughter after the death of her husband, in which he gives her a narrative of the transaction between himself and his son-in-law; and upon an accurate examination of the contents of that letter, it is clear that the General distinctly states there was but one contract on the subject of interest, which he made with his son-in-law. He states the stipulation was that the legal interest, *i. e.*, the legally demandable rate of interest, should be 5 per cent., but that on the occasion of the loan being made, the son-in-law of his own accord said,—“I shall pay you 8 per cent interest, because I shall be able to make more than three times that rate by the employment of the money in trade.”

It is plain that these words were not intended to supersede the written engagement. Independently of this, we find the General giving a striking narrative of what occurred between himself and his son-in-law subsequently, some time after the notes had been made, when the son-in-law rendered a written account in which he had charged himself with 8 per cent. The General's words amount to this:—“I pointed out to Mr. Inglis that he was charging himself with 8 per cent. interest, whereas I was entitled only to 5 per cent;” but the son-in-law said,—“It is all right, I can make more than three times that amount by the use of your money, therefore I desire to pay you 8 per cent.” That conversation, again, is clear acknowledgment on the part of the General that he regarded himself as the legal creditor of his son-in-law for only 5 per cent. It is in perfect harmony with the account given in the letter that the engagement originally was for 5 per cent, but that the son-in-law said,—“He could afford to pay more;” and the General answered, “You can do as you please about it.” It was left, therefore, to the

arbitrium of the son-in-law, if he chose to pay 8 per cent., to pay that amount; but the legal relation which was created, was an engagement to pay 5 per cent. only.

What was done subsequently is not inconsistent with that. We have the fact, that subsequently to the date of the promissory note, on several occasions, the son-in-law rendered to his father-in-law accounts current, in which he debited himself with 8 per cent. instead of 5 per cent., and that he continued that practice down almost to his death; for in one of his repositories after his death, his widow found three accounts of written papers, in which also he had debited himself with 8 per cent. If there had been no written promissory note, or if there had been no history given by the creditor making the claim of the origin of the introduction of the 8 per cent., the accounts so made out by the debtor might be a legal ground for presuming that the original contract had been to pay 8 per cent., or that there had been a new contract to pay that rate of interest. They cannot, however, be used as evidence that the original contract contained in the promissory notes was done away with, and a new contract substituted, for the reason we have already given, *viz.*, that the General admits that when he saw the first account with interest at 8 per cent, he treated it as a thing to which he was not entitled. Clearly, therefore, there was no contract entitling him to 8 per cent existing at that time; and with reference to the subsequent accounts, with perfect notice of those accounts, because he had them in his possession, the General writes to his daughter the letter to which we have referred, explaining how it had arisen, giving, as we have already observed, a history of the introduction of the 8 per cent. that it was a voluntary offer by his son-in-law, and that the General did not fasten it upon him, and make it part of the contract, but said to his son-in-law, "You shall be at liberty to do as you please about it."

The result of the whole, therefore, seems to be plainly this, that so far as the legal right is concerned, there is but one contract existing for valuable consideration and capable of being enforced, *viz.*, the contract made at the time of the loan, in conformity with the written obligation for the loan contained in the promissory notes; that all departures from that in respect of interest are departures which have been made from mere good-will and sense of duty on the part of the son-in-law, who is the debtor, but not as being the result of any legal contract or obligation between him and his father-in-law.

There is no trace that the father-in-law ever treated the matter, up to the time of making the demand, as one which entitled him as a matter of right to interest at 8 per cent.; he always treats it as a matter of bounty and favor on the part of his son-in-law; and he tells his daughter he left his son-in-law at liberty to do as he pleased about it.

We regret that the demand has been now made. It appears that, when the interest is reduced to the legal rate, the sum paid by the present appellant was more than would satisfy the whole demand of the General according to his just right, and the action, therefore, was brought when there was nothing due on the part of the appellant. The consequence must be that the decree of the Court below must be reversed, and the plaint dismissed, and the costs of the proceedings below, and of this appeal must be borne by the respondent, General Lister.

We will make our report, and humbly advise Her Majesty accordingly.

The 17th November 1866.

Present :

Lord Westbury, Sir James W. Colville, Sir E. V. Williams, and Sir Lawrence Peel.

Hindoo Law—Partition—Undivided Property.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Appoovier,

versus

Ramasuliba Aiyar and others.

An actual partition by metes and bounds is not necessary to render a division of undivided property complete. But when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and each member thenceforth has in the estate a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

THIS is an appeal brought from a decree of the Sudder Court at Madras, which affirmed the decree of the Zillah Court of Tinnevely, which itself affirmed the original decree of the Sudder Ameen of that District. It is therefore an appeal from three decrees unanimous in rejecting the claim of the appellant.

The present appeal is founded upon an allegation that certain property, shares in which are claimed by the appellant, continues the undivided property of the family of which the appellant was a member, and which was originally an undivided family. The foundation of the defence to the appellant's claim is an instrument which we will call, for the present purpose, a deed of division, dated 22nd March 1834.

Certain principles, or alleged rules of law, have been strongly contended for by the appellant. One of them is that, if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property, until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established, and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject to which the title is applied.

According to the true notion of an undivided family in Hindoo Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has henceforth a definite and certain share which he may claim a right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the inferior Courts which have been relied upon by the appellant, we believe, upon an examination of them, that there is not to be found in any, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint ownership into separate ownership, namely,

that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the appellant, decided in the month of February 1865, in the High Court at Madras, the Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the lifetime of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; but it is impossible for them here to come to the conclusion that the doctrine contended for by the appellant is to be considered a rule which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by the subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If then the rules derivable from the true theory of undivided family are such as we have described and are not at variance with any settled course of legal decision, let us apply those rules to the deed upon which this case in reality depends.

The appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed actual partition.

It is necessary to bear in mind the two-fold application of the word "division." There may be a division of right, and there may be a division of property; and thus, after the execution of this instrument, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time, when it would be convenient to make that partition.

The deed, after dealing with the villages that were intended at once to be the subject of an actual partition, proceeds thus:—"But inasmuch as it is not intended to divide now." What is the meaning of the words "divide now?" Clearly, to make the same partition of the villages that follow as had previously been direct to be made of the villages which precede. "But inasmuch as it is not convenient to divide now one moiety of the villages" (then follows an enumeration of the villages) "we shall divide every year in six shares the produce of them and enjoy it, after deducting the Sarkar sist and charges on the villages." Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint tenancy is severed, and converted into a tenancy in common.

Then, if there be a conversion of the joint tenancy of an undivided family into a ~~tenancy~~ tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of March 1834, concludes manifest an intention to become divided; for after expressing that they had already divided the silver, brass, utensils, the parties use these words:—"We have henceforward no interest in each other's effects and debts, except friendship between us." We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care ; we have been very much assisted by the argument at the Bar and by the able manner in which the cases on both sides have been prepared. We have no doubt of the true principle which is applicable to the matter or of the legal effect of this deed of March 1834. It operated in law a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make a divided family and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the appellant admitted, with great propriety, that provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere,—we say nothing upon the question of adoption. Her Majesty's order will merely confirm the decree of the Court below.

The 15th December 1866.

Present :

Lord Westbury, Sir J. W. Colvile, Sir E. V. Williams, and Sir L. Peel.

Mahomedan Law—Marriage and Legitimacy—Presumption.

On Appeal from the Judicial Commissioner of Oude.

Ashrufoodowlah Ahmed Hossein and another,

versus

Hyder Hossein Khan.

According to Mahomedan Law, mere continued cohabitation, without proof of marriage or of acknowledgment, is not sufficient to raise such a legal presumption of marriage as to legitimize the offspring. Marriage and acknowledgment may be presumed, but the presumption must be one of fact, and, as such, subject to the application of the ordinary rules of evidence. A subsequent marriage, so far from furnishing a ground for presuming a prior marriage, *prima facie* at least excludes that presumption.

THIS is an appeal from a decree of Mr. George Campbell made by him when Chief Judicial Commissioner of Oude, which reversed a decision in favor of the appellants, the plaintiffs in the suit made by Mr. Fraser, the Civil Judge at Lucknow. The case comes before their Lordships *ex parte*, and, difficult in itself, occasions, by its being heard *ex parte*, an increase of anxiety and difficulty. The appellants are son and daughter, and, as such, heirs of Ameenooddowlah Bahadoor, the late vizier of the ex-king of Oude. The respondent claims to be also a legitimate son, and as such a co-heir of the late vizier, founding his claim on a moottah marriage of his mother, and on his birth in due course, as a son conceived in wedlock of that marriage. He relies also on acknowledgment for many years of him by the late vizier as his legitimate son. The appellants deny the alleged parentage, legitimacy, and acknowledgment.

The suit which gave rise to this appeal results from a precedent litigation between these parties, of which some account is necessary to a complete understanding of the cause.

At the time of the vizier's death, the respondent was not *de facto* a member of his family, having been some time previously expelled by his reputed father, the vizier, from the house, and renounced as a son, under a suspicion of a grave offence imputed to him. On that occasion the vizier executed a formal instrument, which is described in the suit as a deed of renunciation, declaring the respondent not to be his son. At the time of the vizier's death, the respondent, whatever his legal

status, was not *de facto* an apparent heir of the vizier, and the possession of the vizier's estate was, after his death, in some one or more of his undisputed heirs, and no risk of disturbance from disputes as to possession seems to have existed.

A portion of the property appears from the statements on the record to have consisted of Company's paper, endorsed generally to the heirs of the vizier. But this state of endorsement did not require the institution of a merely possessory suit. In this state of things, the respondent preferred a claim to be admitted as co-heir to a joint possession of the estate of the late vizier, and his claim being disputed by the appellants, this gave rise to a summary suit to enforce his claim to possession. If a suit of this kind, which cannot determine right, be instituted where the actual possession is quiet, and where the question in dispute necessarily involves right, the claimant should at once be directed to proceed in a regular suit; for if he proceeds under the Acts subsequently referred to, an expensive and inconclusive litigation is the probable result.

It is unnecessary to go through the history of this previous litigation in detail, or to examine the correctness of the course adopted in its several stages. It was attended with varying success, and finally ended with a decree of Colonel Abbott on appeal, in favor of the respondent, which is to be found at page 9 of the Appendix. That gentleman, the Commissioner and Superintendent of the Lucknow Division, after referring to the Acts of the Indian Legislature, XIX of 1841, XX of 1841, and X of 1851, under which, or one or more of which, the summary proceeding was instituted, observes of them, "they cannot determine right, but they place the *prima facie* heirs in possession, and leave the subject to litigation in the proper course of law." This decision, then, was intended to establish a *prima facie* title in the respondent as co-heir, leaving the right undetermined; but in this case no *prima facie* title exists distinct from the complete title in dispute; the whole subject of litigation resting on legitimacy alone. The right to that status was left undetermined, and was to be decided in a regular suit, to which the appellants were referred.

In consequence of this decision, the plaintiffs brought their suit in the Civil Court at Lucknow on the 6th June 1861. The object of their suit, as it appears from the plaint, was to be relieved from the effects of that summary decree, and to establish the respondent's illegitimacy, so that the proceeding went on in a somewhat inverted order, arising from a misunderstanding of the object of those Acts. The plaint in that suit is set out at page 19 of the Appendix. The plea is not set out at length, but an abstract of it is to be found in Mr. Fraser's judgment at page 30 of the Record. The issues are set out in the same page; they, as also the findings on them at page 35, are carefully framed, and evidence an accurate knowledge of the Mahomedan Law as to legitimacy. The 1st, 2nd, and 3rd issues are alone necessary to be stated here, as nothing which affects the decision of this appeal turns upon the 4th issue, which relates merely to the share if legitimate, and a claim to maintenance if illegitimate. The 1st, 2nd, and 3rd issues are as follows:—

1st.—Did Nawab Amenooddowlah (deceased) contract moottah with defendant's mother before or after his birth?

2nd.—Has the deed of repudiation (A, dated 23 Suffur, 1272 Hijree) the effect of cancelling previous acknowledgment of defendant's legitimacy, if such were made?

3rd.—If defendant be not a legitimate son, is he an illegitimate son of deceased?

It was admitted on the pleadings that a moottah marriage at some time had been contracted between the late vizier and the respondent's mother, but the plaintiff stated in effect that the conception and birth of the respondent preceded that marriage. The plea distinctly stated the marriage, though without assigning a date to it, and alleged the legitimacy of the respondent as a child born of that marriage. The existence of a moottah marriage, therefore, at sometime was not contested, and

the first issue, which by implication admits a marriage, is framed correctly on that state of the pleadings. The second issue, it may be observed, is also very correctly framed. It substitutes for the ambiguous word "sonship," which might include an illegitimate son, the word "legitimacy," and uses the word "acknowledgment" in its legal sense, under the Mahomedan Law, of acknowledgment of antecedent right established by the acknowledgment on the acknowledger, that is, in the sense of a recognition, not simply of sonship, but of legitimacy as son. The first and second issues include the two legal grounds of legitimacy, *viz.*, marriage and acknowledgment, to which the plea is limited. Acknowledgment in the sense of treatment, as evidence simply of marriage or of legitimation, could not have been included with propriety in the issues, though as evidence it would not lose any part of its efficacy by reason of the wording of the issues.

It is not necessary to state the evidence in detail, nor to weigh the conflicting direct evidence; since both Courts, *viz.*, the Civil Court and the Court of the Commissioner, agreed in their view of the facts generally on which the decision turned, the latter adopting the facts as stated in the judgment of Mr. Fraser. Mr. Campbell's judgment was founded mainly on the inferences which he drew from those facts.

Mr. Fraser was assisted in his decision of this important and difficult case by a punchayet as it is termed, formed out of twenty Mahomedan gentlemen, selected with care, and reduced to ten by five challenges on either side; and as the reduced number consisted of ten men, including the high priest, and another Musulman priest, all of whom are stated to have been mutually approved on both sides, a more competent tribunal could hardly have been appointed for the decision of such a case. Their opinion against the claim of the respondent was unanimous. Their opinion had substantially the concurrence of the Judge, Mr. Fraser, who made it the ground of his decision, treating them as assessors, and concurring in their finding.

On a question of Mahomedan Law, so closely allied as it is with the religion of the Mahomedans, the opinion of priests, of the dignity of these, would be entitled to respect, since they are unlikely to be ignorant of it or consciously to swerve from it. Such a decision, therefore, creates a more than ordinary presumption in favor of its correctness. It cannot readily be supposed that the high priests would sanction so irreligious an act, in the view of Mahomedans, as the sacrifice of a son's legitimate status, conferred by acknowledgment of a father, to mere caprice, or to resentment working on the mind of the father; and their decision does not seem to be open to the suspicion of a tendency in the members of the punchayet unduly to augment a father's power. Upon turning to the findings of the issues, they appear to furnish no ground for questioning the care, or learning, or impartiality of the punchayet.

On the first issue, they find that the moottah marriage took place after birth. Mr. Fraser says that, according to the stronger evidence, impregnation took place during the service, and therefore *prima facie* before the marriage. The second finding is as follows:—"We do not find that deceased's acknowledgment that Hyder Hossein was born of his body *has been proved according to the conditions of the law*; therefore the deed of repudiation is correct." This finding, if it were construed literally, and disconnected from the context, would seem to favor the belief which Mr. Campbell seems to have entertained, that the punchayet may have been proceeding on some stricter rules of evidence, under the Mahomedan Law, than the procedure of the Courts at Lucknow authorized; but there is no proof that such was the case, and it cannot be presumed that any rules of the Mahomedan Law of evidence were adopted by them which they could not legally adopt. The presumption should be in support of the regularity of their course.

The rules of evidence of the Mahomedan Law were not generally in force there: it cannot be inferred without proof that they meant to be governed by rules

of evidence foreign to the tribunal. The whole sentence must be read together. Their conclusion, "*therefore*" the deed of repudiation is correct, is a conclusion from the former part of the sentence, and they are plainly referring to that species of "acknowledgment" which the second issue embodies, *viz.*, one of legitimation, and not one simply, constituting a piece of evidence. This is explained also by what follows in the statement of the priests as to the law constituting proof of sonship. "They reply, had the Nawab distinctly stated defendant is to be his son, whether orally or in writing, that would have been *conclusive*." They say nothing here of any peculiarity of proof of such a statement, as a necessary condition of its legitimating power. The conditions of law to which this passage probably refers, are those which are to be found in the 3rd Volume of the *Hedaya*, p. 168, title "Miscellaneous Cases," which treats of acknowledgment of parentage; and the terms "conditions of law" would refer on that supposition to "acknowledgment," and not to the more immediate antecedent "proved." But supposing that the learned Commissioner was correct in his conclusion that the punchayet had proceeded on some special rule of evidence under the Mahomedan Law, applicable to acknowledgment of parentage, the rejection of their finding on that ground merely would not be reconcileable altogether with the opinion expressed by the Privy Council in their judgment (at p. 308 of the 3rd Vol. of Moore's Indian Appeals) in the case of *Khajah Hidayut Oollah vs. Rai Jan Khanum*: "We apprehend," say their Lordships, "that in considering *this question* of Mahomedan Law (that is, the question of legitimacy), we must, at least to a certain extent, be governed by the same principle of evidence, which the Mussulman lawyers themselves would apply to the consideration of such a question."

The general rules of evidence of the Mahomedan Law did not prevail in the Courts in which that cause was heard, any more than they prevail in the Courts at Lucknow; but in relation to that particular subject, so intimately connected with family feelings and usages, that deference was recommended if not enjoined.

Taking the whole of this finding together, and viewing it with relation to the particular issue which it finds, it appears to do no more than say, as sonship does not appear, that is, as the respondent is one of doubtful parentage, the deed of repudiation is correct, whereas it would have been untenable after an established acknowledgment; this reconciles the opinion here expressed with that of the priest at p. 6 of the Appendix, I. 68.

On the third issue they find thus:—"We do not find it proved that Hyder Hossein is a son begotten of the body of the deceased Nawab." The propriety of this finding with reference to the matter in dispute, *viz.*, legitimacy, resolves itself into the question whether, on the whole evidence in this cause, legitimacy ought to have been declared to be established. The consideration, therefore, of this part of the case is for the present postponed.

The judgment of Mr. Fraser is to be found at p. 35 of the Appendix. He states in the commencement of it,—"*that the onus of proof in this case was thrown on the plaintiff, for the defendant had acquired the right of being regarded as one of the legitimate sons of the late Nawab Ameenooddowlah, such being the summary judgment passed by the Commissioner.*" The reason assigned seems to admit the correctness of the general rule, and to assign to the appellant the burthen of proving what is substantially a negative, to the inversion also, in this case, of the ordinary course of proceeding as to possession. The title of the respondent, if established, was one in privity with the appellants' title. The mere fact of possession of a portion of the disputed property by either party was not a matter of any importance to the decision of the question on whom the burthen of proof rested in this case: that depended on the nature of the issues.

Mr. Leith made this inversion of the usual order of proof a subject of complaint against the decision. In many cases, undoubtedly, an unauthorized transfer of

possession would work serious injury and injustice to a claimant ; but in this particular case, it does not appear that the mistake as to the transfer of possession, and as to that of the *onus probandi* which, in the judgment of Mr. Fraser, it involved, worked any real injustice or imposed any difficulty on the appellants from which they would otherwise have been free ; and their Lordships' decision is unaffected by this objection.

This preliminary objection to the mode in which the case was dealt with below being removed, it becomes necessary to view the whole of the facts in proof in the cause ; for the case really depends on a conflict of evidence and the due application of presumptive proof. The facts on which the Commissioner grounded his decision he took from the judgment of Mr. Fraser in the Court below, but they require to be stated with one not unimportant addition, the want of which was made, on the argument, a ground for questioning the correctness of his view of the acts.

It appears to have been a mere omission of statement ; the fact does not appear to have escaped the attention of the Commissioner. The addition required is this, that the mother of the respondent entered the vizier's family as a servant in a menial capacity, and served in that capacity for some time, and after some period of service was taken behind the purdah. The vizier, it may be observed, was then simply a darogah, not much elevated in position above the woman whom he hired and afterwards married. The facts, then, when stated more fully, should stand thus : that the mother of the respondent entered the service of the darogah, afterwards the vizier, in a menial position as cook ; that she was a widow ; that the date of her husband's death was not proved ; that she went out in the course of her service into the bazaar to make purchases, and was taken subsequently behind the purdah ; that the date of the commencement of her co-habitation with the darogah was not proved ; that the date of her pregnancy and of the birth were not proved ; that the date of the moottah marriage was not proved ; and that it was not proved that any change in her position or treatment occurred before the date of her pregnancy. There is, therefore, a total failure of proof whether marriage preceded or followed pregnancy. Mr. Fraser said that pregnancy commenced during the service. Mr. Campbell removed the difficulty by a presumption of an antecedent marriage. Can the defect of the evidence in this case be supplied by a presumption placing that marriage itself at a time anterior to pregnancy ? This is the main question in the cause.

It is to be observed, in considering the propriety of strengthening the weakness of the direct proof by this last presumption, that the mother was living at the time of trial, and that the date of her marriage was a fact which she was competent to prove, as well as the time of the birth of her child. No explanation has been afforded by the Judges who have heard this cause, why the evidence fails on these important points, or why that is to be worked out by a presumption from marriage which living testimony might support, especially in a case where the treatment has been interrupted, and an impediment of more or less weight interposed by the repudiation of the parentage by the reputed father. It would be an easy matter to legitimize a child conceived before marriage by withholding proof of the time of marriage, and resting on an inference from the marriage itself. These or similar reasons may have been present to the minds of the punchayet when they found, on the first issue, that the birth succeeded the moottah marriage. It is important to consider the real nature of such a document. It has no effect whatever on the status of a legitimate son, whether legitimate by birth or made legitimate by acknowledgment. The finding of the punchayet does not contravene that position. Their finding on the issues as to acknowledgment and sonship leaves the respondent in the position of a son of an unacknowledged father. On the status of such a son, the renunciation may be operative according to the Mahomedan Law ;

but it is not conclusive, and may be contradicted and disproved, and does not seem to be more weighty in itself than a declaration by a deceased parent in a case of pedigree. The punchayet say that the renunciation is correct, that is, that their law admits it to take effect; whereas in either of the other cases "the denial is untenable," p. 6. It might be inferred from the proceedings of the punchayet alone, that such an instrument is in use amongst the Mahomedans; a similar document was admitted in proof in a case which came before the Privy Council, *Jeswunt Singhee vs. Jet Singhee* (3 Moore's Privy Council Cases, p. 253). Had this deed of renunciation been evidence on which reliance could be placed as to the denial of sonship which it contained, then it might have sufficed to displace a mere presumption of legitimacy, founded on treatment as a son of one in truth illegitimate. It might be designed and suffice to remove a growing repute. That document, however, cannot be relied on. It was executed under great resentment; it spoke the mind of one irritated by a grievous sense of wrong, and it would be dangerous to give effect to such a document, so prepared and executed, and to place it in the power of an irritated man to bastardize his offspring by an instrument executed under a sense of wrong, especially amongst a vindictive race. It is so difficult to credit the story that the vizier adopted the respondent, who on that supposition would be the bastard son of a loose woman of low degree by some unknown father, that the insertion of that statement in the deed detracts greatly from its credit; an untrue account of the origin of the vizier's connection with the respondent gives rise to some degree of suspicion that the disclosure of the real state of the case might aid the respondent's claim to be deemed legitimate.

As it appears, then, that the punchayet below, and the Court which adopted its finding, attached an undue importance to this deed of renunciation, and as this undue estimate of its weight may have greatly influenced their findings on the other issues, the learned Commissioner seems to be substantially correct in forming his own judgment independently of the findings, in which there had been a miscarriage. Whether he was correct in deciding the issues in favor of the respondent, is a doubtful and difficult question. It would be desirable to know to what authorities, if particular cases were in his contemplation, Mr. Campbell refers at page 44, para. 12.

Unfortunately, he does not name any, but he refers to Mr. Baillie's Book on Inheritance as questioning the broad assumption that "mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring." This statement drops the important qualification "with acknowledgment."

The binding decisions on this subject must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption, or which, when rightly understood, is in conflict with the law as stated by the priests in this case.

The presumption of legitimacy from marriage "follows the bed," and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed, and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favor of marriage and legitimacy must rest on sufficient

grounds, and cannot be permitted to override overbalancing proofs, whether direct or presumptive. The case of *Mahomed Bauker Hossein Khan vs. Shurfoon Nissa Begum* (8 Moore's Reports, p. 159), affirms this principle.

Their Lordships said in that case, which was one of legitimacy under the Mahomedan law :—

“In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan Law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference.”

Their Lordships are not aware that these principles have ever been lost sight of in the Courts in India. They believe that they have been constantly observed by, and have guided the decision of, their Lordships in the Judicial Committee.

In the case in 3 Moore's In. Cases at p. 323, already cited (*Khajah Hidayut Oollah vs. Rai Jan Khanum*), it is observed in the judgment :—

“Without going into the question of the oral evidence, whether there was an express acknowledgment of the child by Fyz Ali Khan, as the son or not, there seems to be that which at least is tantamount to oral evidence of any declaration, because there is a consecutive course of treatment both of the mother and the child for a period of between seven and eight years under circumstances in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued except from the presumption of the cohabitation, and of the son being the issue of the loins of Fyz Ali Khan.” The cohabitation alluded to in that judgment was continual; it was proved to have preceded conception, and to have been between a man and woman cohabiting together as man and wife, and having that repute before the cohabitation commenced; and the case decided that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment sufficed to prove legitimacy. The presumption throughout the whole judgment is treated as one of fact.

It would be much to be regretted if any variance on this important matter arose between the decisions of the Courts and the text of the Mahomedan Law of legitimacy as understood and declared by the high priest, connected as their law and religion are. Such a variance exists between the law as expounded in this case at p. 35, Appendix, and the position contained in Mr. Campbell's judgment, at p. 12, that “mere continued cohabitation suffices to raise such a legal presumption of marriage as to legitimize the offspring.” This position, if established, would have sufficed to legalize the status of the claimant in the case before referred to in 8. Moore, for in that case there was abundant evidence of continued cohabitation between the father and the mother of the claimant; but as there was no proof in that case, either of marriage, or of acknowledgment, he was adjudged to be illegitimate.

This case, then, must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favor of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment, and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being

inferred, and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation.

Mr. Campbell's conclusion that the respondent was the son of the late vizier seems to their Lordships a just inference from the facts, nor does it seem to be at variance with the opinion of Mr. Fraser. Mr. Campbell, in p. 6, treats this as the only question of fact in the case. But the issues distinguish properly between sonship and legitimate birth. Mr. Fraser keeps that distinction clearly before him in his judgment. Mr. Campbell, indeed, does not appear to have lost sight of it, but to have considered that he was entitled to presume the respondent's legitimacy, if cohabitation of his parents, and his birth from them at any time, whether before or after the marriage, were established as facts.

Mr. Campbell does not question, in his judgment, the correctness of the opinion expressed by Mr. Fraser, that pregnancy commenced during the service. At that time cohabitation, in the sense of permanent intercourse such as takes place ordinarily between man and wife, is not proved to have existed between the late vizier and the mother of the respondent. The evidence forbids the presumption that that kind of cohabitation commenced with her service, for a change in the treatment of her ensues when she is taken behind the purdah, and the antecedent relation, according to the evidence, was that of ordinary servitude. If pregnancy occurred, as Mr. Fraser is of opinion that it did, during that service, and when she was in the habit of going from the house freely into the bazaar, sexual intercourse then in that state between her and her master would not have the character of cohabitation of a permanent nature, such as under this head of law distinguishes concubinage from casual intercourse. If the subsequent marriage were adjudged to have relation back, by presumption of law, to the time of impregnation, then such a *presumptio juris* would destroy altogether the difference between a law which admits to inheritance, and a law which excludes from inheritance, an ante-nuptial child. As a presumption of fact, such a presumption is admissible, but then it must be subject to the application of the ordinary principles of evidence.

A subsequent marriage, so far from furnishing, as Mr. Campbell supposes, a ground for presuming a prior marriage, *primâ facie*, at least, excludes that presumption. Therefore, no ground exists for presuming a marriage antecedent to the mootah marriage which at some period or other was established between the vizier and the mother of the defendant. Laying, then, this presumption aside, it appears to have been found in the Court below on evidence which justified that finding, that pregnancy commenced during the time when the mother of the respondent was in service, and before she had the acknowledged status of a mootah wife. There was a marriage, but when it does not appear. It does not appear when the intercourse began which led to the birth, nor what was the nature of it, whether casual or of a more permanent character. It is obvious that the pregnancy might induce the desire to give the woman the reparation of marriage. No difficulty is suggested about rendering these dates certain, which are now left utterly uncertain.

The treatment of the respondent by the Nawab appears for many years to have been that of a son by its father: this, however, is correctly treated by Mr. Fraser as inconclusive in itself, since a son conceived before marriage, and whom his father desired to recognize at some time as a legitimate son, would receive similar treatment. The treatment itself, therefore, does not suffice to dispel the darkness in which this case is left. The *onus* of proof lay on the respondent, on the pleadings in this cause, to prove his mother's marriage, and his own legitimacy as a child of that marriage. There has been no continuing treatment up to the time of the father's death; there has, on the contrary, been an absolute denial of paternity by the reputed father; there is no proof of any acknowledgment, but there is proof of treatment strong enough to prove legitimacy in an ordinary case, but of treatment not inconsistent with the status of a son conceived before marriage.

It is shown that the respondent did not receive all the honors which his brother received. This circumstance is much pressed against him by the appellants.

It may be, however, that the inferiority of mother's condition, or his own later birth, caused the difference; or, on the other hand, the father may have postponed a legitimating acknowledgment, being as yet undecided as to his future treatment of him, and he may have waited to see how the youth conducted himself at puberty. The circumstance of some inferiority of condition having been continued down to the time of final rupture, to some extent supports the case of the appellants, that the respondent was not legitimate. Their Lordships are, therefore, of opinion that the decision of the Commissioner is founded upon presumptions not warranted by the facts of the case, and in some degree upon a misconception of the authorities, and ought not to be allowed to stand. They will, therefore, humbly advise Her Majesty to reverse that decision, and to affirm the judgment of the Court of first instance. Considering, however, that the uncertainty as to the status of the respondent has been mainly caused by the acts of the deceased vizier, the residue of whose estate will, in consequence of this decision, fall to the appellants, their Lordships are not disposed to subject the respondent to the costs in the Commissioner's Court or to those of this appeal.

The 25th February 1867.

Present :

Sir J. W. Colville, Sir E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Mahomedan Law—Marriage and Legitimacy—Evidence (Native Cases).

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

J. P. Wise and others,

versus

Sunduloonissa Chowdranee and others.

The celebration of the seventh month of pregnancy and the celebration of the birth of the son are sufficient to prove the marriage and legitimacy of the son.

A native case is not necessarily false and dishonest because it rests on a false foundation and is supported in part by false evidence.

THIS case comes before their Lordships as an *ex parte* appeal, brought by Mr. J. P. Wise and Juggunath Roy Chowdry, two only of the original plaintiffs, from a decree of the late Court, the Sudder Dewanny Adawlut of Calcutta, which reversed a decree of the Civil Court of Dacca in favor of the plaintiffs.

The original plaintiffs in the suit were Deenomoney, suing in her own right as a widow of a Mahomedan zemindar named Aklakoollah, and as mother and guardian of her minor son Fyzoollah, to establish their respective rights, as such, to the succession of Aklakoollah and the appellants. Deenomoney died pending the suit, which was continued, on behalf of Fyzoollah, by one Mamtazooder Chowdry, as his guardian. The appellant Wise claims to be the assignee of the whole of Deenomoney's share, and of a portion of her son's share, under conveyances from her; and the other appellant claims to be assignee of a portion of Deenomoney's share under a conveyance from Wise, and of a further portion of the minor's share under a conveyance from Deenomoney.

The defendants were Sunduloonissa Bebee, widow of Aklakoollah, Olioollah Chowdry, his son, and Meer Saadut Ally, the husband of a deceased daughter of Aklakoollah, who survived him, and was entitled to share in his estate.

The object of the suit was to establish the marriage of Deenomoney with Aklakoollah, and the parentage and legitimacy of her son Fyzoollah, as a son and heir of Aklakoollah; and, consequently, the titles of both to succeed to Aklakoollah, the widow to her share, and her son as a residuary and heir of Aklakoollah.

The suits could have no operation in any question which might hereafter arise as to the effect of Deenomoney's conveyance of part of her son's property, between him and both or either of the co-plaintiffs Wise and Juggunath.

The cause was decided by the Judge of the Civil Court at Dacca, a Mahomedan, in favor of the marriage of Deenomoney, and of the legitimacy of Fyzoollah; but this decision was reversed by the Sudder on appeal, and from that last decree, the two plaintiffs, Wise and Juggunath, alone appeal, Deenomoney having died previously to the institution of the appeal. Fyzoollah, not joining in the appeal, is named by the appellants as a respondent.

Their Lordships in this as in other *ex parte* cases from India are placed in a position of embarrassment and difficulty. It is not explained why Sunduloonissa, who is in possession of the estate, which is large, does not appear to support the decree in her favor. It is possible that, had the case of the respondents been argued before their Lordships, some view of it, amidst the conflict of evidence and the opposing presumptions which arise from the evidence, might have been offered to their Lordships' attention which has escaped their own careful and anxious consideration of the evidence and judgments. The Counsel for the appellants, Sir Roundell Palmer and Mr. Leith, have argued the case with great candour and completeness. The whole evidence on both sides has been fully presented by them to the attention of their Lordships; but still in such a case there is room for much anxiety and hesitation. The appellants ought not, however, to suffer by reason of this natural hesitation in a tribunal about the correctness of its judgment, induced by an omission of the opposite party, nor ought the absence of the latter from the arena to weaken the presumption in favor of a judgment which is given on their side. The *onus* must still lie on the appellants to show manifest error in the decree appealed from.

The pleadings in this case require attention. The plaint assigns a date to the marriage, and treats the marriage as having taken place at the time when Deenomoney's intercourse commenced, or a few days after; but in a subsequent portion of her plaint Deenomoney states the celebration of the seventh month of her pregnancy, and the celebration of the birth of Fyzoollah, circumstances which, if truly alleged and proved, would suffice to prove her marriage and the legitimacy of her son. Consequently, on the plaint as framed, the plaintiffs would be entitled to recover if this latter portion of the plaint were credited by the Court, and the allegations as to the ceremony and its time disbelieved. The plaint alleges, by anticipation, that Sunduloonissa caused a will to be forged after her husband's death, and enters into arguments to prove that it was forged. The answer of Sunduloonissa sets up that will, and asserts it to be genuine, and relies upon it. In that will are contained a reference to an acknowledgment by the testator Aklakoollah of a kabin executed by him on his marriage with Sunduloonissa, which, if it were established, would show a prior title in her to the zemindary, by conveyance on good consideration at her marriage, and so overrule entirely the claim of a second wife and her son; whereas a will simply would be inoperative, even as to a third, without their assent. Sunduloonissa in her answer relies also on a kubooleut executed to her by Deenomoney for a certain part of the estate, which is, if genuine, an acknowledgment of Sunduloonissa's title by Deenomoney.

These documents are alleged by Deenomoney to be forgeries.

The issues, which are stated at page 32 of the record, embrace all these questions; the marriage of Deenomoney, the parentage of her son Fyzoollah, his legitimation, and the genuineness of the will.

The pleadings in this case, as it has been observed, state the case of each party fully. Nothing comes out in the evidence on the main points in the cause of which some mention is not made in the respective pleadings of the parties.

The case alleged by Deenomoney is that, she was married by a nicka marriage to Aklakoollah at the time of her first consorting with him. She gives the date of the marriage in her plaint. Her case, therefore, as stated by her, excludes the supposition that Aklakoollah raised her to the status of wife subsequently on her proving pregnant with a son which he acknowledged to be his. Still the case may be, that she was acknowledged directly or by implication as a nicka wife at some subsequent period of the cohabitation. In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it, by fabrications of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. The subsequent allegations in the plaint as to the celebration of the seventh month of her pregnancy, and the celebration of the birth of her son, suffice to let in this proof of marriage also.

The plaint does not disclose the history of Deenomoney previously to her introduction into the house of Aklakoollah. But the answer of Sunduloonissa supplies that omission. The evidence on each side supports the general account about Deenomoney, which the answer of Sunduloonissa contains in the 15th page of the record, in the 6th paragraph, *viz.*, that she was a singing girl, and that she attracted the fancy of Aklakoollah, who brought her to and maintained her in his house. It is said, in the statement of Sunduloonissa, that Deenomoney was brought there whilst still very young. There is no evidence that her life had before then been licentious. The imputation then on her character at this time which is found in the answer, seems to be founded on her profession of a public native songstress; and though it is not a profession in India which is followed by women of character, it is by no means a reasonable presumption that a very young girl, a member of such a company, should be in her early years grossly profligate. This, however, is what the answer of Sunduloonissa insinuates as to Deenomoney, even at this early age, for she says of her that, "instead of leaving off her former vicious habits, she continued to indulge her vicious passions," and then she imputes to her four paramours in succession, to one of whom, Shumfutoollah Sirdar, she ascribes the parentage of Fyzoollah.

In viewing the evidence given in this case, it will be important to bear in mind that many of the witnesses for the defendants support these allegations in the answer by evidence as inconsistent as the answer itself, by imputing to Deenomoney the utmost continuing profligacy of conduct in this respect, so little likely to be condoned by a man of a race prone to jealousy and to the seclusion of their women, and yet not accounting for her continued abode in the zenana. Thus she is represented as very profligate at a very early age, as continuing to be very profligate during her whole cohabitation in the zenana of Aklakoollah, intriguing with various men, openly, without disguise, and to the knowledge of a hostile wife; and yet as continuing in the zenana, preserving her status there unimpaired, whatever it was, and treated with outward demonstrations of respect. And what is not a little singular in the alleged life of this woman, to whom such early, such long-continued profligacy is imputed, is that, after the death of Aklakoollah, there is no evidence of any profligate life whatever, and she is found to be for a time received as an inmate in the house of a respectable Mussulman on the footing which she ascribes to herself of widow. All this story, therefore, of her previous and continuing profligacy is found on an examination of it inconsistent and incoherent; it does not cohere, and it is not consistent with any of the ordinary presumptions which would be formed on such an intercourse with the master of a native house in that rank of life.

Some of the witnesses describe her as being in the zenana, not for the ordinary purpose of such an introduction, but simply to divert Aklakoollah with her

songs ; others say that she was there for the ordinary purpose ; Sunduloonissa says she was there as a slave girl, of which there is no proof or likelihood. She does not expressly deny the existence at one time of sexual intercourse between Aklakoollah and Deenomoney ; but her answer puts forth that subsequent case of alleged impotency in Aklakoollah to which many of the witnesses, including two native doctors, depose.

The testimony of these doctors, on examination of it, proves to be utterly worthless and inconclusive in a medical point of view, even supposing that any dependence could be placed on its truth.

For what purpose is this worthless evidence produced ? It is to prove that Aklakoollah could not possibly be the father of Fyzoollah ; but it proves also that he could not possibly suppose himself to be the father of the boy.

If the story were true which the answer sets up on this point, it is inconceivable that Aklakoollah should believe himself to be the father of this child ; for the story is that he had become, some years before its birth, incurably unable, to his own knowledge, of having any sexual intercourse ; that the knowledge of his complaint and its consequences was general in the house : and yet this very man, in this state, who had a legitimate son and daughter, is supposed to be keeping in his zenana a woman who was conducting herself with open profligacy with menial servants, discovered and yet not dismissed. What reason does the answer of Sunduloonissa give for such a toleration of offences, generally so little likely to be pardoned by a Mussulman ? She says, "The truth is that, for her bad character, he ordered her to be put out of the house, but kept her there at the request of other parties." No further explanation is given ; that given of so startling an improbability is, by reason of its generality, and the entire absence of evidence to support it, unworthy of any credit. Consequently, the attempt has been made, and has wholly failed, to render this marriage improbable by reason of the turpitude of the alleged wife. The improbability is reduced to this : that he married a female by a nicka marriage, whom he might probably have obtained on easier terms as an inmate of his zenana. The failure of this attempt and of this evidence to blast the character of the rival claimant as wife certainly tends to strengthen the case that she sets up.

There is no other intrinsic improbability, then, in this story of his having married, by a nicka marriage, a girl of this profession, than that which attaches to it as a disreputable connexion with one who probably would have made no difficulty about entering his zenana on easier terms.

This is an improbability not of a light character, and the evidence to support it ought to be evidence probable in itself and free from suspicion. The burthen of the proof was of course on the plaintiffs. It is impossible for their Lordships to form any opinion on the credit due to witnesses by reason of their status and apparent claims to be trusted, which is at all worthy to be compared to that which is formed by a Judge fit for his office, who sees them, hears them, and probably knows something of their antecedents. This cause between Mahomedans was tried before a Mahomedan Judge. Of the probability of the acts imputed to a Mahomedan zemindar, he is a more competent Judge than either the European Judge of the Sudder Court or their Lordships can be. His judgment seems to have been carefully formed, and his observations upon the witnesses are entitled to a respectful consideration. Had their Lordships found that his observations upon the witnesses themselves were opposed to the opinion of the Sudder Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided, in a conflict of testimony nearly balanced, by the preponderance of probabilities. But if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of native testimony, to say, despite of this positive testimony, we will put

all evidence aside, and act alone on the probabilities of the stories and the inference from the conduct of the parties.

When the cause came by appeal before the Judges of the Sudder Court, they, unfortunately, instead of reviewing the whole case and expressing their opinion upon all the points on which the Court below had based its conclusions which were conclusions of fact, narrowed their enquiry to the simple question whether the plaintiff Deenomoney had proved her marriage. Now the Judge below, in dealing with that question, had brought, and properly brought to the consideration of it, certain inferences from the conduct of Sunduloonissa, which he judged corroborative to some extent of the truth of the plaintiff's story. These were inferences which he drew from the fabrication of documents set up by the defendants, and which the plaintiffs, alleged to be forged, *viz.*, an alleged will, a kubooleut, and certain receipts, which they, the plaintiffs, alleged to have been fabricated to defeat a claim which the defendants dreaded. The argument for the plaintiffs was this :—Unless Deenomoney's claims and that of her son were judged to be formidable, why this fabrication of documents? The answer given below was, the documents are genuine. The Judge below found that they were forged. Their bearing on the issue as to the marriage was direct and important. Yet the Court of Error dismissed entirely from their consideration the question of the genuineness of those documents.

Again, the Judge below had believed the witnesses for the plaintiffs who deposed to the marriage of Deenomoney and the legitimacy of the son Fyzoollah. The Sudder Court did not examine at all into his reasons for believing the evidence. So far from saying that the evidence for the defendants was more weighty, they attached but little weight to it; but they decided against and reversed the finding of the Judge below, merely on inferences from the conduct of Aklakoollah and from that of Deenomoney herself. Though they appear to have been mistaken in calling Deenomoney a Hindoo, who, according even to some evidence of the defendants, had conformed to Mahomedan usages, they say, and say truly, that the marriage was an improbable occurrence; but though improbable, it was certainly capable of being proved by direct and credible testimony as to the value of which they forbore from enquiring. What were the inferences on which they acted? The first is that Aklakoollah took no steps in his life-time to make a public official declaration of any kind of his nicka marriage, and of the legitimation of his child. This child was little more than three years old when Aklakoollah died. He died suddenly, of a suddenly contracted disease, cholera; and no inference against the marriage can reasonably be drawn from such light data. With respect to Deenomoney's own conduct, her non-opposition to the mutation of names on the production of the will is mainly relied on. But it is to be observed that a few months only elapsed between the death of Aklakoollah and this act; that knowledge of it is not brought home to Deenomoney, and that it would be too much to presume her, a native lady whose very status was disputed, and without means, armed at all points with means of knowledge and pecuniary means, and friends able to assist her then. There is the less reason for making this presumption in the present case that it plainly appears that Mr. Mackillop, the Magistrate, who enquired into the circumstances and heard the evidence as to the alleged imprisonment of her, and the duress practised on her, did believe the story, and attributed the withdrawal of her charge to some influence exercised upon her. His view of the case gives an air of probability to her version of her conduct on this occasion. These presumptions, then, seem to their Lordships too feeble to overpower, or materially to weaken, the evidence in proof of her marriage and legitimacy on which the Judge below acted; and as the Sudder Court went not at all into the consideration of the evidence for the marriage and legitimation, and opposed only insufficient inferences to it, the weight of the opinion of the Judge below on these facts stands really unshaken.

The answer, it has been shown, sets up a will; it also alleged that Deenomoney accepted a pottah of certain land, and gave a kubooleut to the defendant, and

took certain receipts. These were all found by the Judge below to be fabricated documents. The Sudder Court expressed no opinion about them ; and it remains for their Lordships now to do, unaided by any judgment of the Sudder, that which they would have been better able to do if assisted by such judgment, *viz.*, to examine the grounds which the Court below had for such conclusion. Their Lordships conceive that, if in this case the defendants are found fabricating documents, and getting up false testimony to meet the case alleged, the reasonable conclusion is that it must have appeared at least a formidable case. But if it were, *primâ facie*, a formidable case, then a considerable part of the oral proof of the defendants must be false ; for where would be the risk of meeting in a Court of Justice a claim of this nature, raised by a profligate woman, living an abandoned life in the house of her keeper, intriguing with his menial servants to his knowledge, and threatened by him for it with expulsion, bearing a child to one of his menial servants, and confessing to several her shame and the real paternity ; never married, nor so reputed to be, and her child never even reputed to be the son of her master, notoriously and by his own confession impotent at the time of its conception before and continually after. If such a woman should have had the strange audacity to prefer so desperate a case before a Court of Justice, who would be found to espouse it ?

The fabrication of the documents, then, supposes a formidable case at least, and a great part of the oral evidence presents one hopeless and desperate. A native, even with an honest case, or his advisers, may fabricate evidence to meet a case which they fear, though they know it to be groundless ; and if this woman and her child stood in an ambiguous relation to the deceased, and the real heir feared that a Court would draw in favor of marriage and legitimacy really groundless conclusions from a plausible appearance of marriage and legitimization, the fabrication might, however wicked, not be fatal to a defence ; but in this case the defendant's oral evidence presents a desperate and hopeless case as the real case of the claimants. If, then, the fabrication be established, proof of that fabrication supports the plaintiff's case to some extent ; for it lays a foundation for, and supports the evidence of those apparently respectable witnesses for the plaintiff, who say that the deceased treated Deenomoney as his nicka wife, so called her, and treated her child Fyzoollah as his own ; and these acts would suffice to prove both marriage and legitimacy, even if the Court refused to believe, or hesitated to believe, the direct testimony as to the ceremony.

Their Lordships have therefore directed their attention, in the first instance, to that part of the judgment in the Court below which treats these documents as fabricated. Their Lordships regret to say that they have no hesitation on this part of the case ; that they agree entirely in opinion with the Judge below, who pronounced them forgeries. The kubooleut, when it is viewed in conjunction with the evidence which accounts for its being given, destroys itself. Deenomoney is described on the face of it as the widow of Rajub, the man to whom she is said to have been contracted, and for whose dwelling-place she was about to build a house on the ground included in the lease. The receipts of course fall with it. The full recitals in all three of the title of the defendant explains the motives for their fabrication, and the date of them shows the most incredible degree of inconsistency in the conduct of Deenomoney, admitting and opposing about the same time the title of her opponents. The will also is surrounded with suspicion, which its internal evidence tends to confirm. It sets up a kabin, never produced, and the non-existence of which, if it ever existed, is wholly unaccounted for. This will is not likely to have been executed by the deceased in favor of his wife with whom he had been at variance. The extract from the criminal register shows that such was the case. If her claim under the kabin had been real, it would most probably have been produced as a check upon her husband during their active warfare ; she represents her husband as merely her surburakar ; and if that were so, he must have been acting

fraudulently in mortgaging her property. His management is not interfered with, even after he had in his life-time, suffered her trust property to be taken in execution for a debt of his own. This appears from the judgment of the Court in the mortgage suit. Taking all these circumstances together, the Court rightly judged the will to be fabricated; and the observations of the Judge on the factum are most weighty. Turning, then, with this assistance to the examination of the positive testimony, this portion of it, at least, may be trusted which shows the woman and her child to be, the woman cohabited with, at least, and the child of the woman acknowledged and declared to be the legitimate child of the father; and this acknowledgment made in words which import a precedent nicka marriage. There appears to their Lordships to be no ground for distrusting the evidence on which the Judge below relies, of the witnesses Surenloollah and Juggonath Goocho, who, though they were not present at the nicka, nevertheless both speak to acknowledgment of parentage and acknowledgment of nicka. Without going the length of saying that the acknowledgment of a son as legitimate who might be a legitimate son of his acknowledger necessarily in all cases raises its mother to the status of a wife—a point which it is not necessary to discuss—it is clear that such an acknowledgment as the present, which acknowledges the mother as wife, involves that consequence. Their Lordships, therefore, cannot find, on a careful consideration of the evidence, and of the reasons given by the Judge in the Civil Court, in his finding on the facts, any sufficient reason for reversing his decision. His judgment seems to be founded on facts fairly inferrible from the evidence, and sufficient under Mahomedan Law to confer on the child the status of legitimate son, and on its mother to whom the declaration extends that of a lawful wife. Their Lordships will therefore humbly advise Her Majesty to reverse the decision appealed from, and to confirm the decision of the Principal Sudder Ameen, with the costs of the appeal in the Sudder Court. The respondents must also pay the costs of this appeal.

The 28th February 1867.

Present :

Sir J. W. Colville, Sir E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Regulation XI. 1796—Confiscation and Sale of property of absconded Offender.

On Appeal from the late Sudder Dewanny Adawlut of Calcutta.

Juggomohun Bukshee,

versus

Roy Mothooranath Chowdry and others.

Regulation XI 1796, being a highly penal statute, should be construed strictly. As it makes no express provision for the case of joint proprietors of land or persons jointly holding a Sudder farm of land, in the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent.

A sale under this Regulation does not extinguish under-tenures or incumbrances created by the delinquent or those through whom he claims.

THE lands which are the subject of this suit are described as three separate holdings forming part of the Government khas mehals in the Twenty-four Pergunnahs. In 1855 they had been granted by the Government of Bengal to one Roy Bycauntnath Chowdry, as the sole registered tenant thereof. His tenure is said to have been in the nature of a perpetual lease; but the instrument or instruments creating it are not before us. He may be taken, however, to have been what is termed in the Regulation, which will be afterwards considered “a sudder farmer paying revenue directly to Government.” Some time in 1855, being charged with an offence, he absconded in order to avoid the process of the Criminal Courts; whereupon his estate was confiscated, and these lands, as part of it, were ordered by

Government to be sold under the provisions of Regulation XI of 1796. They were put up for sale on the 27th of April 1855, and were purchased by one Thakoordoss Bonnerjea, who on the 7th of July 1856, transferred the interest thereby acquired to the appellant. Under this title the appellant claims the entire interest in the tenures under Government of these lands.

The respondents insist that Bycauntnath was a member of a joint and undivided Hindoo family, of which they are the other members; that these tenures, though taken in the sole name of Bycauntnath as the managing member, were acquired with the funds and for the benefit of the joint family; and that accordingly it was not competent to Government to confiscate or sell more than the fractional share and interest of Bycauntnath in this portion of the family estate. They urged this objection ineffectually before the Collector some days before the sale took place; they afterwards repeated it before the Commissioner and Sudder Board of Revenue; but they are said to have made no representations to that Department of Government from which, under the Regulation, the order for the sale emanated. Certain it is that their objections were overruled, and that what was put up for sale and purchased by Thakoordoss Bonnerjea was the whole interest in the lands under the tenures created in favor of Bycauntnath. And the Collector put, as he thought, the purchaser into possession.

Before, however, the assignment to the appellant, a dispute touching the possession of the lands arose between Thakoordoss Bonnerjea, and one Goopeemohun Mitter, who claimed to be tenant thereof under a lease granted to him by Roy Bycauntnath Chowdry, and the respondents jointly. There was the usual appeal to the Magistrate under Act IV of 1840. He held that Goopeemohun Mitter was in fact in possession, and his order was confirmed on appeal by the Zillah Judge. The result was that the appellant having acquired the title of Thakoordoss Bonnerjea, was driven to assert his right to the possession of the lands in the regular civil suit out of which this appeal has arisen.

The suit was originally against Goopeemohun Mitter alone. By supplemental plaint the respondents were made parties to it. The material issues settled by the Judge were, *1st*, whether the lease set up by the defendant Goopeemohun was a *bond fide* lease, or merely colorable and in fraud of law? and *2ndly*, whether the estate being joint, the plaintiff could have any claim over and above the particular share of Bycauntnath.

The Zillah Judge, by whom the cause was tried in the first instance, held that the lease was merely colorable and fraudulent, and that the appellant, as between him and the lessee, was entitled to the possession of the lands. He further held that the question of title between the appellant and the respondents could not be properly tried in this suit; and that the proper course for the respondents, if they had a good title, was to sue to set aside the sale to the extent of that title, making the Government a party to the suit.

Both the lessee and the respondents appealed against this decision, but the former died pending his appeal, which not having been revived was struck off. The respondents prosecuted their appeal, and the Sudder Court overruling the objection that the suit had come to an end with the lessee's interest, on the ground that there was a distinct issue of title joint between the appellant and the respondents, made a decree in their favor, and reduced the interest of the appellant in the lands to the fractional share of Bycauntnath. The present appeal is against the last decree.

It has been candidly conceded by the learned Counsel for the respondents that the evidence in the cause may be taken as sufficient to establish that, as between Roy Bycauntnath Chowdry and the respondents, the lands in question formed part of their joint estate.

This being so, we have only to determine whether the decree of the Sudder Court is erroneous either because, upon the true construction of the Regulation and

the admitted facts of the case, the sale by order of Government has given to the appellant a good title against the respondents ; or because that question cannot be properly litigated and determined in the present suit.

The Regulation is a highly penal statute, and should be construed strictly. That portion of it which relates to the present case is contained in the 4th, 5th, and 6th Sections. The 4th Section provides that, after taking certain specified proceedings, the Magistrate is to order the attachment of any land or other real property held by the absentee in his jurisdiction ; by requiring the Collector, if the absentee be a proprietor of land or sudder farmer, paying revenue immediately to Government, to hold the land or farm in attachment until further notice ; and prescribes the measures to be taken by the Collector on receiving such a requisition. The 5th Section provides for the removal of the attachment on the attendance of the party ; and the 6th Section enacts :—"Should the absentee neglect to attend for a period of six months after the lands have been ordered under attachment, the Magistrate is to report the case to the Governor-General in Council, who will pass such order upon it, and upon the future disposal of the lands, as he may judge proper."

In the absence of clear words indicating such an intention, it cannot be assumed that the Legislature intended to authorize the confiscation of the property of any person other than the delinquent. The Regulation makes no express provision for the case of joint proprietors of land, or persons jointly holding a sudder farm of land. Let it be assumed that such a joint proprietorship or joint holding is ostensible as well as real, and that it appears on the Collector's books. Can it be doubted that in such a case the words "land or other real property held by the absentee" would be limited to his undivided share in the actual lands or farm? Again, suppose that the absentee is one of a joint family possessed of a zemindary, of which one member only is registered as owner. Their Lordships cannot think that, upon the true construction of this Regulation, the fact of such registration would either justify the confiscation of the whole zemindary if the absentee were the sole registered proprietor, or prevent the confiscation of the share of the absentee if he were not the registered proprietor. No analogy can be drawn from the doctrine of forfeiture in this country, where the doctrine is founded on tenure, and where there was a broad and marked distinction between law and equity, the Courts of Common Law taking no cognizance of equitable estates. And if what is above stated be true of a zemindary or other real property of which the absolute interest belongs to a joint family, it is difficult to see why it should not be true of a farm enjoyed by a joint family as part of the joint estate, though taken in the name of one of its members. For the Regulation, at least in the part of it now under consideration, does not contemplate the forfeiture of the tenure, as between landlord and tenant. What it contemplates is the confiscation and sale of the tenure ; and the course pursued in the particular case confirms this construction.

Again, there is no pretence for saying that a sale under this Regulation can carry with it the consequences of a sale for arrears of public revenue ; that it sweeps away all sub-tenures or incumbrances created by the delinquent, or those through whom he claims. The tenure in question, so far as appears on these proceedings, was alienable. It was open therefore to Bycauntuath to put his co-sharers in the estate into the full enjoyment of this farm, and to execute jointly with them, if they were so minded, sub-leases of the lands. No actual conveyance would, under the Hindoo law, be required for the former purpose. Their Lordships therefore, are unable to affirm the broad proposition that under the Regulation it was competent to Government to confiscate and sell this farm, so as to give to the purchaser a good title against the respondents. The Zillah Judge, though he declined to deal with the question in this suit, has not so decided. The Sudder Court has decided the contrary.

It remains to be considered whether the Sudder Court was right in determining the question of title between the appellant and the respondents in this suit. The

appellant had by supplemental plaint made the respondents parties to the suit, though under a kind of protest that it was unnecessary to do so; and this issue of title had been raised and joined between them. The only difficulty in the case is that the lease of Goopeemohun, who was put forward as the tenant in possession, has been pronounced by the Zillah Judge to be simply colorable, and that the Sudder Court has not dealt with his finding on that point. Considering, however, that, as between Goopeemohun and the respondents, the lease constituted the relation of landlord and tenant, and that the intervention of the landlord to defend rested on privity of title; and, further, that the effect of the proceedings in the Foujdary Courts of the 31st December 1855, and the 29th of March 1856 (at pp. 41 and 30 of the Appendix), was to determine that the appellant was out of possession, and to cast upon him the burden of recovering possession by proof of a good title, and that he has failed to do so, except to the extent admitted by the Sudder Court, their Lordships think that the decree under appeal is correct. They must, therefore, humbly recommend Her Majesty to dismiss this appeal.

The 4th March 1867.

Present:

Master of the Rolls, Sir J. W. Colvile, Sir R. T. Kindersley, and Sir L. Peel.

Khas Mehals in the 24-Pergunnahs—Onus probandi—possessory right of Government—Ejectment—Limitation—Evidence (Reception of—on appeal).

On Appeal from the High Court of Judicature of Calcutta.

Gunga Gobind Mundul and others,

versus

The Collector of the 24-Pergunnahs, Prince Gholam Mahomed, and others.

There is no relation of landlord and tenant between the Government and the owner of khas mehals in the 24-Pergunnahs. The latter is the landlord to the ryots, and is not himself a ryot. The right and title of the Government is to the rent, but does not include a right to the possession of the lands, though such a right might arise by forfeiture or extinction of the ownership, and the *onus* is on the Government to prove its claim to the possession of the lands.

A dispute between two private owners, whether as to boundaries or lands, cannot divest the title of either to possession in favor of the Government, if the Government have merely a rent or jumma. The title to sue for dispossession of the lands belongs in such a case to the owner whose property is encroached upon. If he suffers his right to be barred by limitation, the practical effect is the extinction of his title in favor of the party in possession; but his cause of action cannot be kept alive longer than the legal period of limitation of 12 years by the expedient of inducing the Collector to make common cause with him.

The provision in the Code of Civil Procedure which requires Judges who admit fresh evidence on an appeal to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with.

THIS is an appeal from a decree of the High Court of Judicature at Calcutta, which reversed a decision of the Civil Court of the 24-Pergunnahs in favor of the appellants. The suit, the decision in which gives rise to the present appeal, was brought by the Collector of the 24-Pergunnahs on behalf of the Government of India, against Gunga Gobind Mundul, and Sree Mutty Rumoonnee Dossee, described as defendants, and Prince Gholam Mahomed and certain other persons, members of the Mundul family, named in the plaint, and described as the occupiers of five cottahs of the disputed land, who, together with the Prince, are also described as *pro forma* defendants.

The Prince, though called a *pro forma* defendant, is really one of the persons principally interested in the subject in dispute. His title is adverse to that of the Munduls, and he is making common cause with the Collector. On what ground he is inserted as a defendant, it is not easy to discover.

The Prince had instituted three suits for the recovery of the property which is the subject of this suit against the appellants. He divided his claim into three suits, in conformity to the rules of Procedure established in the Courts of the country, in consequence of the separate interests of different members of the Mundul

family, in portions of his property, of which his claim embraced the whole. The suits of the Prince, numbered 43, 44, and 45 of 1857, raise precisely the same question as that which is raised in the suit of the Collector before mentioned, *viz.*, whether the lands sought to be recovered formed part of holding No. 1, and were part of that portion of Colonel Green's estate, which, as the Prince contends, has passed to him by title. In all the four suits, the decision was against the plaintiff in the Civil Court. In the judgment of the High Court it is stated: "It has been admitted by the Counsel on both sides that in the Court below all parties agreed that this appeal (that is, the appeal in the Collector's suit) and appeals Nos. 122, 123 and 124, (that is, in the Prince's causes) should be heard together and treated as one consolidated case, and that all the evidence should be taken as in one cause."

In the Collector's suit alone is there any appeal. That suit, though it asks "a declaration overruling the plea of a rent-free tenure," which is not properly the subject of that jurisdiction, is properly treated in the Civil Court as an ejectment suit, and it was admitted by Mr. Forsyth, who appears for the Collector, to be a suit in the nature of an ejectment suit. For such a suit, which supposes that the plaintiff was put out of possession, it is necessary for him to allege and prove his title to the possession. The Collector sues for the Government, being entitled to sue to enforce their claim to the possession. It appears, however, in this suit, that both the Prince Gholam and the first and second Munduls claim derivatively from the same person, Mr. Johnson; the judgment of the High Court finds, as a fact, that "the property was originally the property of Mr. Johnson." By this word 'property' here, is evidently meant absolute ownership; though it may be by a grant from the East India Company, as the zemindars of the 24-Pergunnahs. The well known cases of *Gardner versus Fell*, and *Freeman versus Fairlie* (*see* 1 Moore's Indian Appeals, pp. 299 and 305), and the observations of Lord Lyndhurst in the latter case on the subject of pottahs, exclude any supposition that such absolute ownership of lands by private persons could not exist at that time in that part of India, as against any claim of the Government to possession of the lands. In the latter case His Lordship terms "the rent," "a jumma or tribute," and says, "the pottah therefore proves no part of the title, it is the conveyance that gives parties a right to claim the pottah." The pottah is evidence of title. If there were anything in the nature of the title of the Government to lands in the 24-Pegunnahs, or any usage or custom in force there, which gave a less permanent interest to the possessors of proprietary right, some authority for, or some evidence of such a variation from, and limitation of the general law, should have been adduced to their Lordships. Their Lordships themselves are aware of nothing to take these titles out of the operation of the principles established by the cases above referred to; consequently, upon the evidence in this cause, it appears that the Government had not, at the time of Johnson's possession of block No. 1, any title to the possession of these lands. If, as the Government contend, these lands were rent-paying lands, the title of the Government was simply to the rent, the nature of which was that of a jumma or tribute; and if the holders of these lands asserted then, or subsequently, a groundless claim to hold them free of rent, as lakheraj, that claim would not destroy their proprietary right in the lands themselves, but simply subject their owners to liability to be sued in a resumption suit, the object of which is, not to obtain a forfeiture of the lands, but to have a decree against the alleged rent-free tenure, involving the measurement and assessment of the lands, and the liability of the person in possession, if he wishes to retain possession, to pay the revenue so assessed. If, at any period during Johnson's possession of these lands, or subsequently, a title to the possession of the lands themselves had accrued to the Government, by any act or omission on the part of the owners of the lands working a forfeiture, that title should have been alleged and proved. But so far from this being attempted to be established, the Collector treated the lands as belonging, by title, to the holding of the Prince, and

the Prince as fulfilling the ordinary obligations of the owner of the land to pay the rent or jumma of them. The title of Richard Johnson existed in 1783, and from that time downwards there is no proof of any Act entitling the Government to take possession of the lands; there is no evidence on which any reliance can be placed, that the title of the Munduls, be it what it may, commenced by violence; but assuming that such proof existed, in what way can a dispute between two private owners, whether as to boundaries or lands, divest the title of either to possession in favor of the Government, if the latter have merely a rent or jumma? The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favor of the party in possession; see Sel. Rep., Vol. VI., p. 139, cited in Mr. Macpherson, 3rd Ed., p. 81. Now, in this case, the family represented by the appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred; and the effect of that bar must operate in favor of the party in possession.

The title, then, of the Prince to recover these lands as against the Munduls is extinguished; then how can the extinction of the proprietary owner's right in favor of the party in possession, confer any right to possession simply on another person not having a title in remainder, if he had not a title to possession whilst the right and remedy remained? Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favor of a remainder man or a reversioner, the present case has no resemblance to that. The interest of the person in possession is not a limited but an absolute interest; the title to the lands is one of inheritance, the title to the kheraj or rent is another. Though these lands are termed khâs mehals, yet there is no proof in this case of any relation of landlord and tenant ever existing between Johnson and the Government; Johnson appears to have been the absolute owner, and no reversion to have existed in the Government. It is not the case of a lease at all, still less of a lease of temporary duration; it is the case of an absolute ownership of the lands; and the title of the Government rather resembles a seignory than that of a lessor with a reversion.

In the Civil Court, the title of the Collector to sue was put upon the ground of the relation of landlord and tenant; and of the right of the landlord to sue in order to protect his tenant, and to assert his title as landlord. But such is not the real relation between the parties which the evidence disclose. Prince Gholam took by conveyance from Brown; he states his title to have been derivative from Johnson, who conveyed to Green, who conveyed to Brown, who conveyed to the Prince a title to the absolute ownership never interrupted.

There is no relation of landlord and tenant in such a case between the Government and the owner; the absolute owner is the landlord to the ryots, and is not himself a ryot. The Government has a title to the rent or jumma. By whatever name it be called, the right and title is to the rent substantially; it does not include a right to the possession of the lands, though such a right might arise by forfeiture, or extinction of the ownership.

It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands,—contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety; but if the party out of possession could set up a sixty years' Law of Limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is, the legal right of the Governments is to its rent; the lands are owned by others: as between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that the title

is extinct in favor of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands to jumma is not affected by a transfer of proprietary right, whether such transfer is effected simply by transfer of title or less directly by adverse occupation and the Law of Limitation.

Their Lordships are therefore of opinion that this dispute as to the identity of the lands, which is substantially the cause of action of the Prince alone, cannot be kept alive longer than the legal period of limitation of twelve years, by the expedient of inducing the Collector to make common cause with him. The judgment appealed against says, "if the Government recover against the defendants, the Prince substantially recovers also." But the Prince has never surrendered or intended to surrender his estate to the Government. He has simply taken a new pottah; that pottah is not the title, but the evidence of title. If the title of the Prince to possession was inconsistent with a title in the Government to the possession, and the Law of Limitation has extinguished that title of the Prince in favor of the Munduls, the defendants, their Lordships are entirely at a loss to see in the arrangement between the Collector and the Prince, any ground in law or equity for making a decree which substantially restores him to what he has lost by laches, supposing the title under which he claims to have been originally good.

If, however, it were considered that the Collector could sue for the possession of the lands upon the title shown to be in the Prince, or that the Prince by reason of the suit being in the Collector's name, could get the benefit of the sixty years' limitations, the question whether the respondents have proved a title sufficient to evict the appellants from the lands in dispute would still remain to be decided. The Collector rests on the title of the Prince. That title is derivative through mesne transfers from Johnson. The place, the Sahiban Bageecha, is said to have been the residence of European gentlemen. It seems probable that both Johnson and Green were British subjects; if they were British subjects, these lands could not have been orally conveyed by Johnson to Green. It is not shown therefore by the plaintiff, on whom the burden of proof lies, that the entries in the register could of themselves operate as a conveyance. They must, at the highest, amount only to evidence from which, with other matters, a conveyance might be presumed. Had the possession of the lands been enjoyed by virtue of and consistently with the title asserted by the plaintiffs, there would have been legal grounds for making such a presumption; but there has been a long adverse possession, and there is no sufficient proof of a contemporaneous possession consistent with the title insisted on by the plaintiffs. The presumption of a conveyance is resorted to, when such presumption is made to support a long possession; but here it would be applied to defeat a long possession. If possession be not consistent with a title which is to be supported by a presumption of a former conveyance, that very possession would furnish ground for building another presumption on the first, *viz.*, of a subsequent re-transfer or re-conveyance. In such a case, therefore, as the present, the defective link in the claimant's title cannot, in the opinion of their Lordships, be supplied by presumption. Then, as it is not shown that these lands could have been transferred orally, and as no direct evidence exists of a conveyance, and as the state of the possession does not support a presumption of one having existed, the question which is asked by the Judge of the Civil Court as to the missing link, is at once pertinent and unanswered. Again, the title from Green to Brown, the immediate vendor to the Prince, has not been traced or proved. It has been assumed that it is sufficient for the respondents to establish that the lands were part of the rent-paying lands comprised in holding No. 1. But even this fact has not, in their Lordships' opinion, been satisfactorily made out. Both parties agree that the lands in dispute lie in block No. 1, which, by the chittas of 1783, appears to

have belonged to Johnson, and to have contained 46 beegahs 10 cottahs. The inference which the respondents draw from the Register book at p. 213 is, that this parcel of 46 beegahs 10 cottahs was subject to a jumma of Rs. 39-13-0; that it had been transferred before 1816 from Johnson to Green; that a fresh pottah for it was then granted in the name of Green; and that it is identical with the joint holding mentioned in the terij of 1833 under the head of Pergunnah Khaspore at p. 38 of the Appendix. It is, however, clear on the face of the terij, that that holding had been supposed to comprise only 30 beegahs; that on a re-measurement it had been found to comprise 42 and a fraction; and that, in consequence of the re-measurement, the jumma of Rs. 39-15 had been raised to Rs. 56-14-1. But no satisfactory or consistent explanation has been given how or why a holding, which in 1816 was taken to contain 46 beegahs 10 cottahs, and, as such, was assessed at Rs. 39-15, was at some intermediate period between that date and 1833 taken to contain only 30 beegahs; and having, on re-measurement, been found to contain 42 beegahs and 16 cottahs, was treated as subject to a higher jumma than that assessed upon it when it was supposed to be 46 beegahs 10 cottahs. Mr. Forsyth thought that there must have been two measurements, of which the first, being inaccurate, had reduced the quantity of land to 30 beegahs,—and that the first estimate of 46 beegahs 10 cottahs was a conjectural one. It does not, however, seem probable that, if this original estimate had been tested by measurement, the measurement would have been so inaccurately made. Again Sir Roundel Palmer's theory is that the original block No. 1 may have contained some 16 beegahs and 10 cottahs of rent-free lands; that the rent-paying lands were therefore taken to be only 30 beegahs, but were found, on re-measurement, to be 42 beegahs and 16 cottahs. This theory implies that block No. 1 contained, in fact, about 59 beegahs of land. The learned Judges of the High Court admit the difficulty, but say that it is not insuperable, and seem to incline to some such explanation as that offered by Mr. Forsyth. These hypothesis, which are not consistent, are all, in their Lordships' opinion, of too conjectural a character to be received in explanation of an admitted difficulty, in order to defeat a title founded on long possession. It may be observed, too, that all of them, and indeed the Register book itself, are not consistent with the case made by the Collector in his plaint, which is founded upon the transfer of the 46 beegahs 10 cottahs, less 3 beegahs and a fraction, from Johnson to Green. The question of the identity of these lands appears to their Lordships to be one of extreme doubt and difficulty. They are, by no means prepared to say that the appellants have made out that the lands in dispute are identical with the parcels of the conveyance under which they claim title; or have proved a title under which they could recover if they were out of possession. But the burden of proof is on the respondents,—it is for them to establish, by sufficient and satisfactory evidence, the identity of the lands conveyed to the Prince by Brown with those sought to be recovered from the appellants; and their Lordships are of opinion that they have failed to do so. If their Lordships had thought otherwise, and that the cause was to be determined upon proof of this identity, they would have felt it very difficult to refuse to send the cause down for a new trial. For the strength of the respondents' case is the Register book; that book was first produced in the Appellate Court, under circumstances in which the appellants may have been, in some measure, taken by surprise; and they may, in the documents produced in support of their unsuccessful application for review, have the means of meeting the inferences to be drawn from that book. Objection to reception of those documents here was taken and allowed; and their Lordships have excluded them from their consideration. Upon the whole case, however, and for the reasons already given, their Lordships are satisfied that the suit of the Collector was properly dismissed by the Zillah Court; and that this judgment, notwithstanding the fresh evidence produced, ought to have been affirmed by the High Court.

Their Lordships wish it to be understood that this judgment leaves the subject of the liability of these lands to be assessed for jumma wholly untouched. All that they decide is the question of proprietary right as between the contending private owners.

It may be right to observe that, in their Lordships' opinion, the provision in the Code of Procedure, which requires the Judges who admit fresh evidence on an appeal, to record their reasons, though not a condition precedent to the reception of the evidence, is yet one that ought at all times to be strictly complied with. It is a salutary provision, which operates as a check against a too easy reception of evidence at a late stage of litigation, and the statement of the reasons may inspire confidence and disarm objection. Their Lordships will humbly advise Her Majesty that the decision of the High Court be reversed with costs; and that the decision of the Civil Court, so far as it dismisses the plaintiffs' suit with costs, be affirmed, and that this appeal be allowed with costs.

The 4th March 1867.

Present :

Master of the Rolls, Sir J. W. Colvile, Sir R. T. Kindersley, and Sir L. Peel.

Hindoo Law (Mitakshara)—Inheritance—Sister's Son—Hindoo Widow—Suit by Reversioner.

On Appeal from the late Sudder Dewanny Adawlut at Agra.

Thakoorain Sahiba and another,

versus

Mohun Lall and others.

According to the Mitakshara, a sister's son cannot inherit.

A person having only a contingent estate during the life-time of a Hindoo widow, is permitted to sue simply on the ground of the necessity that the contingent reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way—i. e., that he holds the character which he professes.

THEIR Lordships have authorized me to state that, in their opinion, the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the plaintiff, Mohun Lall, one of the respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the life-time of the appellant Thakoorain. Such a suit is permitted simply on the ground of the necessity that the contingent Reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way,—in other words, that he holds the character which he professes to hold.

Now the admissions which have been properly and candidly made at the Bar, have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint there was some uncertainty as to the mode in which the parties sought to establish their title, there was apparently some confusion in the mind of the pleader whether Inderjeet or his father was what we call the "*propositus*," and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the Sudder Court, that confusion had been dispelled, and the Judges of that Court (as appears by their judgment) considered the case on the assumption that Inderjeet was, as he no doubt was, the "*propositus*," and that the respondent had to show that he was in the line of heirs to him.

The admission, however, which Mr. Piffard made at the Bar to-day, implies that the learned Judge of that Court decided in favor of the respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a sister's son, he comes within the category of the cognates or *bundhus*. That view is now abandoned, and therefore the question is narrowed to that raised by the very ingenious argument of Mr. Piffard, *viz.*, whether, upon the true construction of the Mitakshara, the sister's son does not come in as one of the earlier class of heirs known as Sapindas ?

We think that, if this question were *res integra*, and to be determined on a construction of the Mitakshara alone, there would be considerable difficulty in coming to the conclusion to which Mr. Piffard would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly, that whilst among the cognates the aunt's sons are included, the sister's sons should be altogether excluded, from the inheritance ; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth Section, which says that " on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." The difficulty, however, that occurs on the words " on failure of the father's descendants " is really not insuperable, because they may well be taken to import the failure of the father's descendants, who, according to the rules expressed in the treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit not only to sisters' sons, but to sisters who, *ex concessis*, are excluded from the inheritance.

Mr. Piffard's argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the treatise called Vyavahāra-Mayū' kha ; but afterwards he fell back upon the authority of Balambhatta and Nanda Pandita. The two authorities are not consistent. We may at once dismiss that of the Mayū' kha by saying that that treatise, though received in the Bombay Presidency, appears to be of no authority in the districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. Piffard, because it gives the right of heirship to the sister herself, and not merely to the sister's son; and puts the sister after the paternal grandmother and between the paternal grandmother and the paternal grandfather.

The other argument, that on which Mr. Piffard finally rested his case, is shortly this. The seventh Article of the fourth Section of the second Chapter of the Mitakshara says,—“ On failure of brothers also, their sons share the heritage in the order of the respective fathers.” Two ancient commentators, Balambhatta and Nanda Pandita held that the words “ their sons share the heritage ” are to be construed so as to include the daughters as well as the sons of brothers and the sons and daughters of sisters ; and Mr. Piffard would have us adopt this construction. But the Article clearly implies that the parent, if in existence, is to take the succession. And accordingly the two Hindoo commentators (*see* the note on Section 10, Article 1,) would include sisters in the term “ brothers,” and give them a place in the line of succession. But Mr. Piffard is constrained to admit that sisters are excluded. In fact, it would not suit his client's case to admit them.

On the other hand, if “ brothers ” are to be taken simply as “ brothers,” and “ their sons ” as brother's sons, the text of the Mitakshara is perfectly clear ; and the first Clause of the fifth Section shows that, on the failure of brother's sons, Gentiles share the estate, the paternal grandmother being the first person of that class of heirs who take the estate. Again, were the arguments in favor of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction, of the words of that treatise, to run counter to that which appears to them to be the current of modern authority. To alter the Law of Succession as established by a uniform course of decisions, or

even by the dicta of received treatise, by some novel interpretations of the vague and often conflicting texts of the Hindoo commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities, we have first the decision of the Sudder Dewanny Adawlut, at Calcutta, in 1806. It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo Law. That decision has received the high sanction of Sir William Macnaghten; it is also cited by Sir Thomas Strange, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. Piffard, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo treatises. For at page 85 of the second volume of Mr. Macnaghten's 'Principles and Precedents,' we have the bywusta or opinion of the Pundit of Zillah Behar, purporting to interpret the text of Jagnavalkya, and making no reference whatever to this decision of the Sudder Court. He there puts sister's sons out of the category in which Mr. Piffard would include them; although, erroneously perhaps, he puts them among the *bandhus*, or distant kindred. Again, from the MS. case produced at the Bar, we find that the Agra Court, overruling its decision in this case, has recently held that the sister's son is not in the line of heirs at all; that the same point has been decided at Madras, and was recently decided in the High Court of Bengal. It had previously been decided in the case which is set forth in the record. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar, cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The respondent Mohun Lall must also pay the costs of this appeal.

The 8th March 1867.

Present:

Sir J. W. Colville, Sir E. V. Williams, Sir R. T. Kindersley, and Sir L. Peel.

Trial (of questions of facts).

On Appeal from the High Court of Judicature of Bengal.

Meethun Beebee,

versus

Busheer Khan and others.

In trying a question of fact, no Judge is justified in acting principally on his own knowledge and belief or public rumour, and without sufficient legal evidence.

THE appellant is the widow of Agha Jan Khan, a native of Cabul, who died domiciled at Cuttack in July 1857. Her father was one Burkhordar Khan, also probably a Pathan by origin, who, after carrying on some kind of business at Cuttack, is said to have gone into the Dekhan with elephants, horses, and other merchandise, and to have died there in the early part of the present century. He left a widow, Fatima; the appellant, his only daughter; and a son named Hossein Khan. The appellant married first an Afghan, named Omar Khan, who died some time in the year 1824; and very shortly after his death she married his near relation Agha Jan Khan. By Omar Khan she had a son, Timour Khan, who died in 1829. In the year 1831 there appeared at Cuttack one Ismail Khan, who claimed to be the brother of Omar Khan, and, as such, entitled

to share in that portion of his estate which had descended to his son Timour Khan. Agha Jan Khan and the appellant compromised this claim for a sum of rupees 300, and the release of a debt of rupees 721. After that transaction Agha Jan Khan carried on business at Cuttack, became the registered and ostensible proprietor of the zemindary talook, which is the principal subject of dispute in this cause, and the apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The respondents claim to be the co-sharers and residuaries who, according to the Mahomedan Law, are entitled to divide the estate of Agha Jan Khan with his widow. They contend that Koollee Khan, the common ancestor, had two sons, of whom Morad Khan was the father of Agha Jan Khan, and of the female respondent Bukht Banoo ; and the other, Nidda Khan, was the father of the before-mentioned Omar Khan and Ismail Khan ; and that Ismail Khan was the father of the respondents, Busheer Khan and Moneer Khan, and of one Goolmer Khan, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the zemindary and other property alleged to have belonged to Agha Jan Khan at the time of his death from his widow, who was in possession of it.

The appellant has contested their title to sue ; she has claimed the sum of rupees 20,000 as due to her from the estate of Agha Jan Khan as the stipulated amount of her dainmohr, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary course of this Committee, would not disturb, unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the appellant to disprove the pedigree of a family whose domicile was in Afghanistan ; and the omission of Ismail Khan to mention in the petition, which is in evidence, his relationship to Agha Jan Khan, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of Omar Khan's son ; and on the other hand, we have indisputable evidence that Agha Jan Khan received into his family, and recognized as kinsmen, first Goolmer Khan, and afterwards the respondent, Moneer Khan. The identity of that Goolmer Khan with the Goolmer Khan of the pedigree might be disputed ; but there can be no doubt as to the identity of Moneer Khan. The persons, therefore, who are entitled to share the estate of Agha Jan Khan have been correctly ascertained. Again, both the Courts below have held that the appellant has failed to establish her claim to the dainmohr ; and nothing has been urged on the present appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question on this appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of Agha Jan Khan ?

The respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the appellant is, that no part of it, in fact, belonged to her husband ; that it was acquired from the proceeds of a business carried on with funds left by her father Burkhordar Khan ; that those funds and that business belonged to herself, her mother, and her brother, as the co-heirs of Burkhordar Khan ; and that her late husband, though the 'gerent' of the business, and the ostensible purchaser and registered holder of the talook, was a mere manager and trustee for her and her family.

Of the issues recorded in the suit by the Court of first instance, the second and the fourth both related to this question of title to the property. Under the first of these the respondents had to prove that " the whole of the disputed property was

the own property of Agha Jan Khan." Under the other, the appellant had to establish that "the zemindary and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her; and that Agha Jan Khan had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of Burkhordar Khan and of his family, and the poverty of both the husbands of the appellant, and of their family; other parts went to show that the zemindary was purchased with funds supplied by Fatima, and even that she was recognised as zemindar, and received the rents. There is a failure of proof that the property of Burkhordar Khan (and it is very uncertain what was the amount of it) furnished the capital on which Agha Jan Khan traded; there is no proof that the business carried on by Burkhordar Khan was an established continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses state, his widow engaged after his death. And, lastly, the case set up by the appellant, and sought to be established by her witnesses, is inconsistent with her acts and conduct. For though Fatima pre-deceased Agha Jan Khan, Hossein Khan is stated by some of the appellant's witnesses to have survived him, and appears by the appellant's written statement to have left a daughter. Yet, on the death of her husband, the appellant claimed to be entitled to the whole of the property; and procured, by petition to the Collector, the registration of the talook in her sole name. No suggestion that either Hossein Khan or his daughter had any interest in the property was then made.

It may be said on the other hand, and probably with truth, that the oral testimony adduced by the respondents is hardly more trustworthy than that on the part of the appellant. Such as it is, it is directed to prove the poverty of Fatima and her family; and that Agha Jan Khan, at the date of his marriage, had some, though not very ample means. The respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the cause which shews that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin, and then another, tend to the conclusion that he was the master of his family, and head of his own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that by means of successful traffic during that period he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favor of that of the respondents.

But between these two cases lies the theory adopted by the Principal Sudder Ameen. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the appellant and her husband in partnership, the original capital of the appellant being derived, not from her own family, but from the estate of her first husband, Omar Khan; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal Sudder Ameen, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their Lordships, as it appeared to the High Court of Calcutta, not to be so established. The theory of a partnership, properly

so called, between the appellant and her husband is not only inconsistent with her case as first launched, but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove it. There is, no doubt, some evidence of partnership dealings between Omar Khan and Agha Jan Khan. But that evidence points rather to some joint adventures, than to a regular partnership in a continuing and established business. Again, there is evidence that Omar Khan died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of Ismail Khan is less than Rs. 4,000. But, as Mr. Pontifex argued, there is no proof that this sum, or any other property of the appellant, entered into the capital on which Agha Jan Khan traded. Had that been her case, she might have proved it by the books of the business which are presumably in her power and custody, the evidence of gomasthas, or the like. If the Principal Sudder Ameen thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the enquiry, and by calling for the production of proper proof. Meer Dowlat's testimony fails very far short of such proof. And the conclusion of the Principal Sudder Ameen as to the partnership seems to rest principally on his own knowledge and belief, or public rumour,—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion that, upon the facts alleged and proved in this case, the judgment of the High Court, which, varying the decree of the Principal Sudder Ameen, dealt with the property in dispute as wholly that of Agha Jan Khan, is right. They feel, however, considerable doubt whether that judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not failed to do complete justice between the parties. The suit is not an administration suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise are ascertained by proper enquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to re-open the litigation in this suit. But whilst they humbly recommend Her Majesty to dismiss this appeal with costs, they will add a recommendation that the order be without prejudice to any proceedings on the part of the appellant to establish any debt, other than her claim for daimohr, against her husband's estate, or any lien, in respect of such debt, upon that estate.